MICHIGAN LAW
UNIVERSITY OF MICHIGAN
701 South State Street
Ann Arbor, MI 48109-3091

JULIAN DAVIS MORTENSON
James G. Phillipp Professor of Law

June 06, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write with an enthusiastic recommendation of my student Wes Ward for a clerkship in your chambers. Wes is an incisive thinker, an earnest believer in public service, and a thoughtful and other-oriented human being. He'd be a terrific addition to your clerkship class both for the substance of his work and for his team play in chambers.

I first got to know Wes as a student in my first-year constitutional law class in the winter semester of 2021. Even in the somewhat odd hybrid circumstances of the class, Wes stood out from early on in the semester, in part because of his sheer command of the material on cold call, and in part because he attended every office hours bursting with questions for me—and enthusiasm for his classmates' perspective. He's the kind of person who is so intrinsically interested in the ideas being engaged with that the sheer intellectual generosity of his curiosity and enthusiasm is infectious. I came to think of him as part of the "glue" that would hold office hours conversations together, always finding a way to stitch together something Person A said with something Person B had said earlier. He had a way of doing this that was both useful and also made the conversation—all of which was taking place over Zoom, at least for office hours—feel more integrated and less like a series of one-off Q&A interventions

Wes did a terrific job on the exam, turning in a thorough, careful, insightful and creative set of responses to the essay questions—written with a clear and incisive style that made it easy to follow his analysis of even the most complicated questions. I was struck in particular by his discussion of a fact pattern involving Covid-related restrictions and requirements for a state bar exam; I had intended the question principally to test equal protection concepts, but in addition to thoroughly airing those issues, Wes went on to identify a very interesting set of Dormant Commerce Clause issues that I hadn't anticipated coming out of anyone's responses. It was a really impressive job.

Wes has come to law school with a strong sense of public service mission—the sort of earnest and realistic commitment to dedicating his career to helping others that is especially inspiring to encounter as a teacher. He worked before law school at a legal non-profit for low-income migrants, and has devoted much of his law school time—in the classroom, in extra-curriculars, and in the summers—to exploring a wide range of government and public interest career possibilities. He remains open to many public service possibilities, but it seems to me that the question of consumer protection occupies a place particularly close to his heart. In part this is because of his work experience at places like the New York Consumer Fraud and Protection Bureau, but more fundamentally I think it is connected to his own sense for the vulnerability of families facing hard questions about difficult situations. His father was diagnosed with ALS several years ago, and the process of trying to find treatments for what is an all-but-hopeless diagnosis opened Wes's eyes to the ways that consumer protection implicates some of the most vulnerable social relationships that exist. I really look forward to seeing where these interests take Wes over the course of his career, and I am confident that we can expect great contributions from him for decades to come.

I hope it's clear that I hold Wes in high regard, both personally and academically. Please don't hesitate to let me know if I can answer any questions or otherwise help you assess his candidacy in any way.

Best regards,

Julian Davis Mortenson
James G. Phillipp Professor of Law
Michigan Law School

June 05, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

For the clerkship position, I highly recommend Wes Ward to you. Wes's analytic skills, writing abilities, and research persistence would greatly benefit your chambers.

Wes was a student in my Environmental Law & Sustainability Clinic. The Clinic provides students the opportunity to manage real cases for real clients. In the context of practicing energy, environmental, and conservation law, we focus on the following skills: writing for diverse audiences; research efficiency; representing organizational clients; and negotiation. In Winter 2022, he was enrolled in the clinic, which consists of a seminar class and case work.

Under my supervision, Wes represented two nonprofit organizations for whom he developed a litigation plan to address a facility that was polluting Lake Superior. Wes had to research a myriad of topics, including the public trust doctrine and water quality permitting. His research was meticulous and persistent. For his common law research, he efficiently found the most helpful and harmful case law. For his regulatory research, he thoroughly explored a dense complicated administrative scheme. When he hit a roadblock, he did not give up – he came to me with questions, returned to the research, and did not give up until he found what he needed.

Wes was a very good writer and analyst. He was thoughtful about core writing mechanics like organization, topic sentences, and matching his propositions with sufficient supporting evidence. He edited his memos effectively based on his own assessment and supervisor review. He always worked to see the legal forest from the trees of cases, statutes, and regulations.

Aside from being a good researcher, writer, and analyst, Wes had exemplary work ethic and a professional demeanor. He was punctual, communicated regularly, and was always prepared for meetings. He worked very well with his teammate. Perhaps most importantly, his clients were incredibly pleased with his work.

Wes's ability to engage in high level objective analysis and writing, combined with his work ethic and personality, make it easy for me to recommend him without reservation. If you wish to further discuss, please contact me anytime at osalim@umich.edu or 586-255-8857.

Sincerely yours,

Oday Salim
Director, Environmental Law & Sustainability Clinic

Wesley B. Ward

308 Packard Street, Apartment 6, Ann Arbor, Michigan 48104
(309) 830-3879 • wbward@umich.edu

WRITING SAMPLE

I prepared this appellate opinion during the fall semester of 2022 for a Judicial Clerkships practice simulation. The case involved a fictitious high-school student who sought to place advertisements on Cleveland's public transit vehicles. Her application was rejected, then she filed suit on First Amendment grounds. Professor Kerry Kornblatt provided editorial suggestions, but this writing sample reflects my own work.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

_____

GREATER CLEVELAND REGIONAL TRANSIT AUTHORITY (RTA) and JOSEPH CALABRESE, individually in his official capacity as General Manager and Chief Executive Officer of the RTA

Defendants-Appellants,

No. 22-16123

v.

KATHERINE FISHER, through her parent and guardian NOAH FISHER

Plaintiff-Appellee.

Appeal from the United States District Court for the Northern District of Ohio at Cleveland.
No. 22-cv-16123—Diane L. Clayton, District Judge.

Defendants Greater Cleveland Regional Transit Authority (RTA) and Joseph Calabrese appeal the district court's order granting a motion for preliminary injunction. Plaintiff-Appellee Katherine Fisher proposed an advertisement to appear on Defendant's vehicles, which RTA rejected for violating two of its policies. Ms. Fisher and her father sought a preliminary injunction relief requiring Defendant to display the advertisement, which the district court granted. We REVERSE the district court's order and REMAND with instructions that the Plaintiff's complaint be dismissed.

I. Background

A. Defendant-Appellant's Advertising Program

Defendant-Appellant Greater Regional Transit Authority (RTA) allows advertisements to appear on its vehicles, given the advertisements comply with certain policies. Defendant-Appellant Joseph Calabrese is the CEO and general manager of RTA and has overseen RTA's advertising program since its inception. R. 030. Proposed advertisements are submitted to a contractor who performs preliminary tasks, like providing the customer with a price estimate. Id. Each month, the contractor sends the proposed advertisements to Calabrese for review, who makes the final determination about whether the advertisements comply with RTA policy. Id.

RTA's advertising program seeks to "provide revenue for RTA while at the same time maintaining RTA ridership and assuring riders will be afforded a safe and pleasant environment." R. 042. Maintaining and increasing ridership sustains the financial health of the transit system, Mr. Calabrese argued, and that depends on riders having pleasant experiences. R. 037. RTA reserved the right to approve all advertising and displays through this program while prohibiting eight categories of advertisements including those that:

> a. Depict or promote an illegal activity.
> b. Contain false, misleading, or deceptive material.
> …
> e. Are scornful of an individual or a group of individuals.
> …

> g. Support or oppose the election of any political candidate.
> h. Contain material which is obscene or sexually explicit, as defined by Ohio law.

R. 042. Mr. Calabrese contends that the provisions at issue here, the policy against scorn and political advertising, are not "unusual." R. 038.

Mr. Calabrese reviews "a lot of ads" in his position, but few have "jump[ed] out to [him] as a problem." R. 033, 036. He rejected four advertisements in fourteen years for not complying with RTA policy. Two of the proposed advertisements supported political candidates, including one who was a personal acquaintance of Calabrese. R. 032. Mr. Calabrese could not recall why the other two advertisements were rejected but they were not for violations of the policy against scorn. R. 032–033. Mr. Calabrese mistakenly allowed an advertisement for bungee jumping at a national park, which is illegal under a federal regulation. R. 033.

Mr. Calabrese claims that he does not "just rubber stamp all of the ads" but scrutinizes them for noncompliance. R. 036. For example, when LeBron James left the Cleveland professional basketball team for the first time, an advertisement was proposed that "might have been scornful." R. 036–037. Calabrese consulted with "some members of the Board of Trustees" to decide that the advertisement did not violate RTA policy. R. 035. In another circumstance, Mr. Calabrese fact-checked a claim about a roller coaster. R. 036.

B. Plaintiff-Appellee's Proposed Application and Denial

Plaintiff-Appellee Katherine Fisher is a seventeen-year-old environmental advocate who applied to purchase an advertisement on RTA vehicles on June 15, 2022. R. 016, 019, 020. She considered RTA vehicles an ideal medium to spread her message outside of her existing school-based influence. R. 020. Fisher believes recycling is a pressing and important issue in Cuyahoga County, so her proposed advertisement read, "People who don't recycle are TRASH. By not doing your part you are stealing the future from your children and grandchildren. *for a greener tomorrow, support the only true pro-environment candidate: Yuna Bang for mayor*." R. 039. Her message intentionally

included "strong wording" that was "not meant to make someone feel good" but rather evoke frustration or anger. R. 022. The strong language was "the point." Id. The advertisement's endorsement of mayoral candidate Yuna Bang for Mayor "felt like an important opportunity to affect change." Id.

Ms. Fisher's application was rejected on June 29, 2022, and her subsequent appeal for reconsideration was denied on July 14, 2022. R. 040–041. Calabrese said this decision "was pretty easy." The policy "obvious[ly]" violated the prohibition on supporting a political candidate, R. 038, and "[t]he proposed ad called people quote unquote "trash."… Just imagine if someone on the bus called another rider trash to their face," so violated the scornfulness policy. Id.

C. Procedural History

Ms. Fisher brought this case on August 8, 2022, alleging RTA and Mr. Calabrese violated her First Amendment rights by denying her application and that RTA's policy is facially unconstitutional under the First Amendment. R. 008. She then filed a motion for preliminary injunction the following day. R. 010–011.

The district court granted relief to Ms. Fisher, ordering that the challenged advertisement be displayed. Fisher v. Greater Cleveland Regional Transit Authority (RTA), No. 22-cv-16123 (N.D. Ohio Oct. 12, 2022); R. 043–045. The court reasoned that RTA operated a public forum because it permitted political speech and inconsistently enforced its advertising policy. R. 044. RTA's policy was subjected to strict scrutiny, which RTA conceded that it could not meet. The court ruled in Ms. Fisher's favor, and RTA filed this timely appeal. R. 045.

II. Discussion

A. Standard of Review

This Court ordinarily reviews a district court's order granting a preliminary injunction for abuse of discretion, but when the First Amendment is implicated, *de novo* review is appropriate. Bays v. City of Fairborn, 668 F.3d 814, 819 (6th Cir. 2012). In

deciding motions for preliminary injunction, district courts weigh four factors: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury absent the injunction; (3) whether the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of an injunction." Bays v. City of Fairborn, 668 F.3d 814, 818–19 (6th Cir. 2012). In the First Amendment context, the movant's likelihood of success on the merits predominates over the others, so this Court conducts *de novo* review. City of Fairborn, 668 F.3d at 819. See Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp., 511 F.3d 535, 541 (6th Cir. 2007).

When determining whether a government entity's restriction on public speech violates the First Amendment, we first determine the type of "forum" at issue. Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1885 (2018). The Supreme Court recognized two types of fora at issue here: "designated public forums" and "non-public forums." Designated public forums have "not traditionally been regarded as a public forum" but which the government has "intentionally opened up for that purpose." Id. Governments may impose reasonable time, place, and manner restrictions on private speech in designated public forums, but content restrictions must satisfy strict scrutiny. Id. Non-public forums are not by tradition or designation a forum for public communication and the government retains the power to preserve the property for its dedicated purpose. Id. Restrictions to speech in non-public forums must be reasonable considering the forum's purpose and may not "suppress expression merely because public officials oppose the speaker's view." Id.

B. RTA Operates a Nonpublic Forum

[Court concludes that RTA operates a nonpublic forum.]

C. RTA's Restrictions and the First Amendment

Governments may restrict the content appearing in nonpublic forums, but those restrictions cannot discriminate based on the viewpoint expressed and must be reasonable given the forum's purpose. Am. Freedom Def. Initiative (AFDI) v. Suburban Mobility

Auth. for Reg. Transp. (SMART), 978 F.3d 481, 493 (6th Cir. 2020); Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1885 (2018). RTA's ban on political candidate advertising is reasonable but its policy against scornful advertisements is not viewpoint neutral and violates the First Amendment.

1. Restriction on Speech For or Against Political Candidates is Reasonable.

RTA rejected Ms. Fisher's advertisement for violating the agency's policy against political candidate advertising. Unlike the policies in prior cases, this policy is clear and objective, indicating that it is reasonable under the law.

When a government restricts speech in a nonpublic forum, content limitations must be reasonable given the purpose of the forum. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985). Reasonableness does not require the government to impose the least restrictive means to achieve a forum's purpose, nor must such purpose be compelling. Id. at 808. Rather, the restriction must only have a permissible reason and provide a "sensible basis for distinguishing what may come in and what must stay out." Mansky, 138 S. Ct. at 1888.

In Lehman v. City of Shaker Heights, a political candidate unsuccessfully challenged a city's ban on political advertisements on city buses. 418 U.S. 298, 299 (1974). The plaintiff wished to promote his candidacy for Ohio State Representative with advertisements on car cards. Id. at 299. The Supreme Court found, first, that the city operated a nonpublic forum, id. at 303, then ruled that the City had permissible reasons for imposing these content restrictions: short-term candidacy advertisements could jeopardize long-term commercial advertising, political advertisements could create doubts about favoritism, and riders "would be subjected to the blare of political propaganda." Id. at 304. The First Amendment, the Court held, does not require every publicly owned space to be open to every pamphleteer and politician. Id.

More recently in Minn. Voters All. v. Manksy, a political organization successfully challenged a prohibition on wearing political logos at polling locations

because the policy could not be applied reasonably. Mansky, 138 S. Ct. at 1892. The Court held that the polling locations were nonpublic forums, and Minnesota had a permissible purpose of creating an "island of calm" where citizens could peacefully vote. Id. at 1886–87. But the Court found that the state's definition of "political" was not capable of reasoned application. Id. at 1888–92. Minnesota's ban on materials that could be perceived as political issues carried with it inherent ambiguity. For example, a t-shirt reading "Support Our Troops" or "#MeToo" could be banned. Id. at 1889–92. The term "political" was "unmoored" and prone to "haphazard interpretation" rather than expressing an objective and workable standard. Id. at 1888. Despite these serious faults, the Court accepted that the insignia of political parties and candidates was "clear enough" to be reasonably restricted. Id. at 1889.

This Court followed this rationale two years later in Am. Freedom Def. Initiative (AFDI) v. Suburban Mobility Auth. for Reg. Transp. (SMART), where a civic organization challenged a transit agency's advertising policy against "political or political campaign advertising." AFDI, 978 F.3d at 486. With its policy, the transit agency sought "to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience." The panel held the policy was unreasonable because the agency failed to adopt a "discernible approach" to determine what was allowed and disallowed. Id. at 494.

There, the Court reasoned that the term "political" was too ambiguous for reasonable application. In comparing "political" with "political campaign," it ruled that the latter lacked an "expansive reach" and could easily be identified by an objective person. Id. at 494, 498. Although someone could determine what is sufficiently "political" to warrant having their advertisement denied, "the subjective enforcement of an indeterminate prohibition increases the opportunity for abuse in its application." Id. at 497. In overruling the transit agency's policy against "political" advertising, the court concluded that the restriction on "political candidate" advertising suffered no such defect. Id. at 498.

Here, the challenged policy lacks the deficiencies of the Mansky and AFDI policies. RTA's policy against advertisements for or against political candidates had a permissible purpose, see Lehman, 418 U.S. at 303, and the policy is clear regarding which content is permissible and which is prohibited. AFDI, 978 F.3d at 498.

RTA had a permissible purpose when it banned advertisements by political candidates. Like Lehman, RTA sought to provide revenue, while assuring riders with a safe and pleasant experience. See Lehman, 418 U.S. at 304 (finding that short-term candidacy advertisements could jeopardize long-term commercial advertising and impose on captive riders). Ensuring that customers continue to use RTA services is central to the financial health of the transit system, and preventing these impositions advances that permissible purpose. R. 042, 037. This policy does not fit perfectly with its purpose. Political advertising permitted under RTA's policy could cause riders discomfort or jeopardize long-term commercial advertising. But the First Amendment does not obligate RTA to narrowly tailor its policy in this manner when it operates a nonpublic forum.

RTA's prohibition on advertising that advocates for or against a political candidate is clear and objective. The Mansky and AFDI courts both addressed policies that banned all "political" speech, not only speech involving candidates for office. Mansky, 138 S. Ct. at 1889; AFDI, 978 F.3d at 497. Those policies gave administrators discretion to decide whether an advertisement with overtones of public issues was actually "political" and therefore in violation of the policy. AFDI, 978 F.3d at 497. Both cases implied that prohibiting political candidate advertising was sufficiently clear. Mansky, 138 S. Ct. at 1889; AFDI, 978 F.3d at 498. That is precisely what RTA has done.

Ms. Fisher's proposed ad clearly violates RTA's policy. Her advertisement endorses "the only true pro-environment candidate: Yuna Bang for mayor," befitting of the "blare of political propaganda" that RTA sought to avoid. See Lehman, 418 U.S. at 304. RTA objectively determined that the ad violated its reasonable policy to protect the purpose of its forum.

RTA's prohibition on political candidate advertising is facially constitutional and, as applied to this case, does not violate Ms. Fisher's First Amendment rights.

2. Restriction on Scornful Speech is Viewpoint Discriminatory.

RTA also rejected Ms. Fisher's advertisement because it violated RTA's policy against scornful advertisements. Recent decisions from the Supreme Court and this Court compel us to hold that this policy is not viewpoint neutral and violates the First Amendment.

Public entities may implement reasonable content restrictions in nonpublic forums but may not impose restrictions that discriminate on the perspective expressed. Mansky, 138 S. Ct. at 1885–86. For example, the government may ban political campaigning on a military base, but if it were to allow such speech, it could not provide access to only the Democratic or Republican Party. See Greer v. Spock, 424 U.S. 828, 831, 838–40 (1976); Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 829–30 (1995). Similarly, the government may not determine that speaking in favor of one issue or cause is acceptable but speaking against it is prohibited. AFDI, 978 F.3d at 500. When the government acts in this manner, "it suggests that the government seeks to accomplish" more than the forum's assigned purpose, but instead seeks to suppress certain ideas. AFDI, 978 F.3d at 499 quoting R.A.V., 505 U.S. at 390.

Two recent Supreme Court decisions are pertinent to our analysis. In Matal v. Tam, 137 S. Ct. at 1751, an individual successfully challenged the denial of a trademark because the government's policy was viewpoint discriminatory. The government denied a trademark for "The Slants," an East Asian racial slur, because it violated the Lanham Act's disparagement clause. The Supreme Court held the clause was facially unconstitutional because the clause required the government to favor one moral standard and disfavors another. Passing judgment on the adequacy of a moral standard is viewpoint discrimination and therefore, impermissible under the First Amendment. Id. at 1763. Two years later in Iancu v. Brunetti, 139 S. Ct. 2294, 2297–2298, 2301 (2019), the government denied a trademark because the brand name resembled a vulgarity. A unanimous Supreme Court held that the "immoral or scandalous matter" provision of the

Lanham Act disfavored certain ideas while favoring others, which like Matal, was viewpoint discrimination. Id. at 2301–2302, citing Matal, 137 S. Ct. at 1751.

This Court applied Iancu and Matal to a transit advertising case, holding that a policy prohibiting advertisements that are "likely to hold up to scorn or ridicule any person or group of persons" violated the First Amendment. AFDI, 978 F.3d at 486. The Court explained that the transit agency's policy distinguished between two opposed sets of ideas: those promoting a group of people and those disparaging the group. Id. at 500. The transit agency prohibited an advertisement because it implied that Islam was a violent religion, but the agency conceded that an advertisement implying that Islam was a peaceful religion would be permissible. Id. The policy, if allowed, required a public official to decide in which contexts speech disparaged a person or group, and when an advertisement with a negative tone did not "hold up to scorn." This Court found that viewpoint discrimination did not vary "depending on the context," and accordingly, the policy could not stand. Id. at 501.

Here, the same logic applies. RTA's prohibition on advertising that is "scornful of an individual or a group of individuals" discriminates based on the viewpoint expressed.

The scornfulness policy requires a context-dependent analysis and enables a public official to pick which ideas may appear in the forum. Instead of prohibiting an entire subject of discussion, the policy distinguishes between two ideas: those that ridicule or scorn a group and those that support the group. See id. at 498, 500. By favoring speech that is not scornful, RTA's policy enacted the same error appearing in Matal, Iancu, and AFDI. See Matal, at 137 S. Ct. at 1763; Iancu 139 S. Ct. at 2301, AFDI, 978 F.3d at 486. A policy disfavoring scornful speech cannot be evenhandedly applied any more than a policy that prohibits disparaging or ridiculing a group of persons. See AFDI, 978 F.3d at 486, 501. These policies require public officials to make decisions depending on the context, indicating they are facially invalid under the First Amendment.

The unconstitutionality of RTA's scornfulness policy becomes clear when applied to this case. Ms. Fisher's proposed advertisement disparages people who do not recycle. The Supreme Court and our Circuit precedent dictate that this must be compared to an

advertisement that promotes people who do not recycle, rather than scorn them. See AFDI, 978 F.3d at 500 (comparing advertisements promoting church attendance to those ridiculing church attendees). If an advertisement praising people who do not recycle would be allowed, the policy unconstitutionally discriminates based on viewpoint. An advertisement that read, "Recycling is too expensive. Thank you for throwing your cans in the trash!" does not appear to violate any provision of RTA's policy, R. 042, and would likely be allowed.

We could further compare Ms. Fisher's advertisement that "People who don't recycle are TRASH" to an advertisement that read, "Not Recycling is Bad." The two advertisements share a perspective on recycling and have a negative tone, but the latter would be unlikely to violate RTA's policies. R. 042. Even so, an official must determine whether this advertisement was sufficiently disparaging to warrant the condemnation given the context of transit advertising. See AFDI, 978 F.3d at 501. Our precedent seeks to avoid this type of line drawing since viewpoint discrimination cannot vary depending on the context. Id. The official's discretionary decision would be impermissible under the First Amendment.

RTA's policy against scornful advertisement impermissibly chooses which viewpoints are allowed in its forum and is facially unconstitutional under the First Amendment.

III. Conclusion

The Court concludes that RTA permissibly rejected Ms. Fisher's proposed advertisement. Fisher cannot show she was harmed by the impermissible grounds for denial as the policies are separate and independently sufficient. See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285–86 (1977) (upholding a government action when there is a constitutional justification, even if the government considered an unconstitutional factor that supported the action). We, therefore, REVERSE the district court's order granting a preliminary injunction and REMAND with instructions that the Plaintiff's complaint be dismissed.

Applicant Details

First Name	**Aaron**
Last Name	**Watt**
Citizenship Status	**U. S. Citizen**
Email Address	**awatt3@gmu.edu**
Address	**Address** **Street** **3054 S Woodrow St** **City** **Arlington** **State/Territory** **Virginia** **Zip** **22206**
Contact Phone Number	**2079022263**

Applicant Education

BA/BS From	**University of Maine-Orono**
Date of BA/BS	**June 2001**
JD/LLB From	**George Mason University School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=54701&yr=2011**
Date of JD/LLB	**May 16, 2024**
Class Rank	**Below 50%**
Law Review/ Journal	**Yes**
Journal(s)	**Journal of Law, Economics and Policy**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Claeys, Eric
eclaeys@gmu.edu
7039938247
Rabkin, Jeremy
jrabkin@gmu.edu
Zywicki, Todd
tzywick2@gmu.edu
7039939484

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Aaron Watt
3054 S Woodrow St. Arlington, VA 22206
207-902-2263 Awatt3@gmu.edu

April 13, 2023

Re: Law Clerk Application

Dear Judge:

I write to express my interest in serving as one of your law clerks for the 2024-2025 term. My prior career in business would make me a valuable part of your chambers. I have experience working with a team and know how to effectively fulfill my role within an authority structure. Also, my time researching and writing as an intern on the United States District Court for the District of Maine gave me valuable experience I can build on as your law clerk.

Presently, I work for George Mason Law School as a research assistant to Professor Jennifer Mascott and the C. Boyden Gray Center for the Study of the Administrative State. Professor Mascott's career is remarkable, having clerked for two Justices on the Supreme Court, published extensively, and served as Associate Deputy Attorney General at OLC. I edit papers for Professor Mascott and assist with other projects as needed. My work for the Center has given me a strong foundation in administrative law. This semester, I also work as a law clerk on the Senate Judiciary Committee for Senator Ted Cruz. My work on the Committee requires me to research legal issues and write properly blue-booked memos at a demanding pace.

My wife and I decided to walk away from a successful business so that I can enter public service. Clerking on your court would give me the experience I need to begin that career. My long-term goal is to serve in either the judicial or executive branch of government. Learning federal law under you would help me develop my legal knowledge and give me the credentialing I need to serve effectively.

Thank you for considering my candidacy as a law clerk in your chambers. I look forward to hearing from you after you've had a chance to review my application.

Sincerely,

Aaron Watt

AARON WATT

Awatt3@gmu.edu | (207) 902-2263 |
3054 S Woodrow St. Arlington, VA 22206

EDUCATION

2021 - Present — ANTONIN SCALIA LAW SCHOOL

- President of the Federalist Society at Scalia Law
- Journal of Law Economics and Policy Member
- 3.2 GPA
- Placed Third in "Legal Writing for Law Clerks" Class.

2018 - 2021 — UNIVERSITY OF MAINE

- B.A. in Philosophy. Minor in Political Science and Legal Studies
- Summa Cum Laude; 3.97 GPA
- Defended Thesis on Sex and Gender

2020 - 2021 — College Republicans Student Member

2020 - 2023 — Leader at "Keep Nine." Work with Roman Buhler to gather students interested in creating a Constitutional Amendment to fix the number of Supreme Court Justices at nine to prevent partisan court packing.

LEGAL WORK EXPERIENCE

January 2023 - Present — Employed as a Law Clerk at the United States Senate Judiciary Committee for Senator Ted Cruz. I research a variety of topics and write memoranda.

May 2022 - Present — Work as a research assistant for Jennifer Mascott and the C. Boyden Gray Center for the Administrative State. Edit and cite check papers for Professor Mascott.

May 2022 – August 2022 — Employed as an intern for Judge Lance Walker at the Federal District Court in Bangor, Maine. Worked on a variety of writing and research projects.

PRIOR WORK EXPERIENCE

2004 - Present — Owner of Aaron's Painting Inc.

Started the company. Grew to one of the largest in the region.

2017 - Present — Owner of Quality Property LLC

Began this property investment company in 2017. Developed real estate for 5 years. Currently own 12 rental units.

2020 - 2021 — Logic Teacher at Penobscot Christian School; Bangor, Maine

2020 – Present — PADI SCUBA Instructor

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Academic Transcript

G01340876 Aaron K. Watt
Jun 01, 2023 08:56 am

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Institution Credit Transcript Totals Courses in Progress

Transcript Data
STUDENT INFORMATION

Name : Aaron K. Watt

Curriculum Information

Current Program
Juris Doctor

College: Antonin Scalia Law School

Major: Law

This is NOT an Official Transcript

INSTITUTION CREDIT -Top-

Term: Fall 2021
Academic Standing:

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	092	LW	Institutions of American Law	CR	1.000	0.00	
LAW	096	LW	Intro to Lgl Res Writ &	C-	2.000	3.34	
LAW	102	LW	Contracts I	CR	2.000	0.00	
LAW	104	LW	Property	B+	4.000	13.32	
LAW	108	LW	Economics for Lawyers	A	3.000	12.00	
LAW	110	LW	Torts	B+	4.000	13.32	

Term Totals (Law)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA

Current Term:	16.000	16.000	16.000	13.000	41.98	3.23
Cumulative:	16.000	16.000	16.000	13.000	41.98	3.23

****Unofficial Transcript****

Term: Spring 2022

Academic Standing:

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	097	LW	Trial-Level Writing	C-	3.000	5.01	
LAW	103	LW	Contracts II	A-	3.000	11.01	
LAW	106	LW	Criminal Law	B+	3.000	9.99	
LAW	112	LW	Civil Procedure	B	4.000	12.00	
LAW	266	LW	Legislation & Statutory Interp	A	2.000	8.00	

Term Totals (Law)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	15.000	15.000	15.000	15.000	46.01	3.07
Cumulative:	31.000	31.000	31.000	28.000	87.99	3.14

****Unofficial Transcript****

Term: Summer 2022

Academic Standing:

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	320	LW	Supervised Externship (E)	CR	2.000	0.00	

Term Totals (Law)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	2.000	2.000	2.000	0.000	0.00	0.00
Cumulative:	33.000	33.000	33.000	28.000	87.99	3.14

****Unofficial Transcript****

Term: Fall 2022

Academic Standing:

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	098	LW	Appellate Writing	C	2.000	4.00	

LAW	116	LW	Administrative Law	A	3.000	12.00	
LAW	121	LW	Const Law I-Structure of Gov't	B+	4.000	13.32	
LAW	201	LW	LglWriting for Lw Clerks(E)(W)	A	1.000	4.00	
LAW	510	LW	Scholarly Writing	NC	2.000	0.00	

Term Totals (Law)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	12.000	10.000	10.000	10.000	33.32	3.33
Cumulative:	45.000	43.000	43.000	38.000	121.31	3.19

****Unofficial Transcript****

Term: Spring 2023

Academic Standing:

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	226	LW	Federal Courts	B	3.000	9.00	
LAW	295	LW	Real Estate Finance	A	3.000	12.00	
LAW	314	LW	Remedies	B+	3.000	9.99	
LAW	325	LW	Supv Externship-Capitol Hill(E	CR	3.000	0.00	

Term Totals (Law)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	12.000	12.000	12.000	9.000	30.99	3.44
Cumulative:	57.000	55.000	55.000	47.000	152.30	3.24

****Unofficial Transcript****

TRANSCRIPT TOTALS (LAW) -Top-

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Total Institution:	57.000	55.000	55.000	47.000	152.30	3.24
Total Transfer:	0.000	0.000	0.000	0.000	0.00	0.00
Overall:	57.000	55.000	55.000	47.000	152.30	3.24

****Unofficial Transcript****

COURSES IN PROGRESS -Top-

Term: Spring 2023

Subject	Course	Level	Title	Credit Hours
LAW	099	LW	Legal Drafting	2.000

****Unofficial Transcript****

Term: Summer 2023

Subject	Course	Level	Title	Credit Hours
LAW	321	LW	Supervised Externship (E)	3.000
LAW	369	LW	Jurisprudence - Justice Thomas	1.000

****Unofficial Transcript****

RELEASE: 8.7.1

George Mason University
Antonin Scalia Law School
3301 Fairfax Drive
Arlington, VA 22201

June 02, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I understand that Aaron Watt is applying for a clerkship in your chambers. Mr. Watt is a promising law student and would make a first-rate clerk. I recommend him and I encourage you to consider his application.

Mr. Watt took Legislation & Statutory Interpretation with me during the spring semester in the 2021-22 academic year. He was an outstanding student. In a class of 60, he and one other student carried in-class discussions. More than half a dozen times, Mr. Watt asked questions in class that made class discussions come alive. Mr. Watt was especially interested in the relations between statutory interpretation and judges' senses of moral judgment, and between statutory interpretation and the authority of judges under constitutions with separation of powers. If I had tried to get students to discuss those topics, most students would have been uncomfortable. When Mr. Watt raised the topics, they didn't seem so forbidding and the class got into really serious discussions about the place of interpretation in law.

I reviewed Mr. Watt's examination answer before writing this letter and it is a really fine piece of writing. The answer had clear topic sentences, the writing was direct, and the arguments were easy to follow. Mr. Watt reasoned to a clear conclusion, but he conducted balanced analysis along the way. As I'm sure you know better than I, every principle of statutory interpretation has a limit and most of them have "counter-principles." Mr. Watt minded the limits of the principles he applied and he did a really nice job anticipating and addressing counter-arguments to the conclusions he reached.

I have gotten to know Mr. Watt much more than I do most second-year students. Mr. Watt came very often to office hours last year. I also worked closely with him in the lead-up to an event at the law school that he organized and I moderated. Mr. Watt is a really enthusiastic and upbeat person. He is curious philosophically and politically. He is excited about law, and his excitement is infectious. He has strong opinions, he likes to test them in argument, and he takes correction and counter-arguments well. His classmates know he's opinionated, and many disagree with him. But they respect him because he's public-spirited, he's respectful of classmates who don't agree with him, and he contributes to making our law school a vibrant environment.

Mr. Watt would be a spark-plug in any judicial chambers. He'll take care of his own assignments. But Mr. Watt will be curious about all of the other cases going through chambers. If a judge wants give and take in chambers, Mr. Watt will be happy to contribute to a vibrant exchange. And Mr. Watt will make his colleagues better workers. He loves the law, and every week he will do or say something reminding his colleagues what an opportunity it is to work with the law and to serve the public.

I hope these thoughts help you as you evaluate Mr. Watt's application. Please do not hesitate to call me ((703) 993-8247) or email me (eclaeys@gmu.edu) if you have any questions about his candidacy. Otherwise, thank you very much for considering Mr. Watt.

Sincerely,

Eric R. Claeys
Professor of Law

George Mason University
Antonin Scalia Law School
3301 Fairfax Drive
Arlington, VA 22201

June 02, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

Aaron Watt was the outstanding student in my Administrative Law class in Fall 2022. He not only wrote one of the best exams (graded blind, with just a serial number to identify each student) but was one of the best contributors to class discussion during the semester. If I pitched a general question – like, "Does this make sense?" "What's the best justification here?" – he'd be among the first volunteers. Better still, he'd take it in stride if I disagreed. Watt is older than most students and has had experience running a small business – which means, he understands how onerous and obtuse government regulation can seem on the receiving end. But he appreciates that lots of people don't see things the way he does and the political system – even the economy – has to accommodate a lot of different views. So Watt doesn't get discouraged or resentful when he finds himself in the minority, even in a law school class; but he doesn't get intimidated, either. He voices his opinions amiably but usually with firmness. I should add, for someone who was skeptical of much of the doctrine in contemporary administrative law, Watt had the patience and discipline to master the details. He'll be a great asset to his chambers as a clerk. When he moves on in his career, he'll be a really fine lawyer.

Sincerely,

Jeremy Rabkin
Professor of Law

Jeremy Rabkin - jrabkin@gmu.edu

George Mason University
Antonin Scalia Law School
3301 Fairfax Drive
Arlington, VA 22201

June 02, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Re: Clerkship Application of Aaron Watt

Dear Judge Sanchez:

I am pleased to recommend Aaron Watt to you for a clerkship. Aaron was a student in my class during the 2021-2022 year in our law school's full-year sequence of Contracts law (both Contracts I and II). Having had the opportunity to have Aaron as a student in class for the full-year as well as having had an opportunity to speak with him outside class frequently, I have gotten to know Aaron as both a person and individual more than the typical student. Based on those experiences, I am pleased to recommend Aaron to you.

Aaron's path to law school was unconventional, but also accounts for much of the esteem I hold for him and why I urge you to consider him for a clerkship. Before even attending college, Aaron started and grew his own company in central Maine, Aaron's Painting, Inc., and later began a property investment company which he grew to 12 rental units. Finally, in 2018, after 15 years of running his own businesses, Aaron returned to college at University of Maine, and finally, here to Scalia Law School.

As you might imagine, these experiences have shaped Aaron with a degree of purpose, judgment, commitment, and intellectual seriousness that is rare for a law student. I particularly enjoyed having him as a student in my Contracts classes, as an unusually large number of classic cases in Contracts law deal with construction contracts (such as Judge Cardozo's famous case, Jacob & Youngs v. Kent). I would often call on Aaron with the question, "Mr. Watt—how does this really work in the real world? How do you solve this problem with your contracts?" Not only I, but the entire class, benefited from his thoughtful contributions on these issues.

Needless to say, these pre-college and law school experiences of hard work, creativity, risk-taking, and managing a variety of different people, have also given Aaron a distinct sense of career focus and personal maturity, as well as an ability to relate well to people of a variety of backgrounds and life experiences. In addition, whenever I meet students who are considering returning to law school after some time working, especially if they have worked in a non-professional position, I connect them with Aaron so they can hear his advice and perspectives on law school, and he invariably is happy to spend his time talking with them.

His maturity and sense of purpose is also reflected in his recognition as President of the law school's Federalist Society chapter as a second-year student. Although that is significant under any circumstances, Scalia Law is notable as being an unusually large and active chapter, and to have distinguished himself from his peers so rapidly is notable.

With respect to his academic performance, it is evident that Aaron's record has been uneven so far. Based on my experience of over 25 years at a law professor teaching at five different law schools, I can attest that this sort of start is quite typical of students who have returned to school after several years working as they get the "hang" of school again. My experience also indicates that students who show the work ethic, leadership, passion, and character like Aaron, tend to get stronger as they go and especially thrive as they move from broad first-year subjects to upper-level classes that tend to focus on more specific topics and to integrate classic legal thinking with more complicated real-world challenges. He received a grade of A- in my Contracts II class (spring of his first year), a strong performance that I think reflects his ability accurately (I also recognized him as one of a handful of students in class to receive distinction for his contributions to the class discussion).

Based on all of this, I am pleased to recommend Aaron to you for a clerkship in your chambers. I think he would benefit personally and professionally to an unusually large degree and would be unusually appreciative of the opportunity this would provide him. And, in exchange, you will be receiving a man who is unusually interesting and mature in character and work ethic and who is destined to be a leader in the profession for years to come.

Sincerely,

Todd Zywicki

Todd Zywicki - tzywick2@gmu.edu - 7039939484

In the

United States Court of Appeals
For the Fourth Circuit

NO. 22-1280

COALITION FOR TJ,

V.

FAIRFAX COUNTY SCHOOL BOARD

Appeal from the United States District Court for the
Eastern District of Virginia
No. 1:21-cv-00296—Claude M. Hilton, *Judge*.

ARGUED SEPT 15, 2022 — DECIDED OCT 10, 2022

Before: ROBERT B. KING, ALLISON J. RUSHING, and
AARON K. WATT, *Circuit Judges*.

OPINION

AARON WATT, *Circuit Judge*:

We are asked to decide if a newly implemented admissions policy at Thomas Jefferson High School ("TJ"), in Alexandria, Virginia violates the Equal Protection Clause of the U.S. Constitution. The text of the admissions policy does not treat students of different races differently, yet the plaintiff, Coalition for TJ ("the Coalition"), argues the policy uses other factors as a proxy for race. The Fairfax County School Board ("the Board" or "FCSB") contends that even if race was considered when forming the plan, it may do so to improve racial diversity at their school. Based on the record below, we conclude that Board's policy is unlawful. Accordingly, we affirm the judgment of the district court.

A.

TJ is a Governor's School in Alexandria, Virginia. It is one of the highest-ranking high schools in the United States. Until the year 2020, students were admitted first and foremost on merit. The school's competitive application process included an exam which tested math, science and reading skills. JA2957. This process resulted in TJ accepting a high percentage of applicants from middle schools with centers for academically advanced students. A large number of these students are Asian American. JA0187.

In 2020, the Fairfax County School Board decided to change their admissions process. The record tells us why. A variety of concerns about the diversity of TJ were discussed and

concerns specifically relating to the racial makeup of TJ came up more than once.

- In June 2020, Karen Corbett Sanders called the Class of 2024 admissions data for Black students unacceptable and promised action. She addressed an email to the superintendent stating, "We need to be explicit in how we are going to address the under-representation" of Black and Hispanic students. JA0426.

- The first proposal Fairfax County Public School administrators presented to the board declared that TJ should "reflect the diversity. . . of the community. . ." The presentation discussed their prior inability to achieve significant racial diversity. It then compared historical admissions by race against the projected racial effect of the proposed policy. JA0293-96.

- Two board members exchanged texts expressing their feelings that the revision process had an "anti Asian feel." JA0119, JA0125.

- On October 6, 2020, the Board passed a resolution requiring the Superintendent to state in the annual diversity report, "the goal is to have TJ's demographics represent the region." JA2980. The resolution passed 11-0. This was the same meeting at which the Board eliminated the entrance exam students were required to take when applying to TJ.

The Board ultimately chose an admissions plan that was facially race-neutral. This new admissions plan spreads TJ seats across a large geographic region. Prior to the changes, the school used a merit-based test to put all students on an

equal playing field. Now, the school uses a system that first determines which location a student is from, and next decides if that student is one of the more meritorious students at that location. This method takes seats away from academically advanced schools (and students) and reallocates them.

Following implementation of the new plan, changes in the racial makeup at TJ were substantial. Year over year statistics showed the proportion of Asian American students dropped 19%. The proportion of Black and Hispanic students rose by 500% and 288% respectively.

B.

In March 2021, the Coalition filed a complaint alleging the policy implemented by FCSB violated the Fourteenth Amendment to the United States Constitution. After substantial discovery, the district court received cross motions for summary judgment in December, 2021. In February, 2022, the district court granted summary judgment for the Coalition and denied summary judgment for the Board. The Board now appeals arguing the district court erred in concluding the new admissions plan had a disparate impact on Asian Americans, and also erred in concluding the plan was formed with a constitutionally impermissible purpose.

II.

The 14th Amendment to the United States Constitution protects any person within the jurisdiction of the United States from being denied the equal protection of the law. U.S.

Const. amend. XIV, § 1. As government actors, public schools are obligated to conform their practices to this requirement. Schools must not discriminate against students based on race. *Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan.*, 347 U.S. 483, 493 (1954).

There are, however, a few exceptions to this rule. The 14th amendment does not prevent government institutions from being race conscious when correcting past racial discrimination. *See generally, Id*. at 294. When a particular government body, such as a school, has discriminated against students based on their race in the past, it can enact policies to correct that past discrimination *Id.* The Equal Protection Clause also does not prevent schools from placing value on student body diversity – even if this means considering race as one of many factors. *See Regents of Univ. of California v. Bakke*, 438 U.S. 265, 406 (1978); *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

While discrete situations where schools can consider race during admissions exist, courts look critically at admissions plans designed to impact people differently depending upon their race and a strict standard of scrutiny is applied. *Univ. of California v. Bakke*, 438 U.S. 265, 267 (1978); *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 297 (2013). Strict scrutiny is necessary, because "otherwise the court would have no tool to distinguish remedial policies from simple racial politics." *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion). Furthermore, if a policy is adopted with discriminatory intent, but that intent is hidden behind a veil of neutrality, a court must evaluate the facts of the case to determine if an Equal Protection violation occurred. *Vill. of*

Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266, (1977).

A.

Race-neutral neutral policies are not all equal. Some advance legitimate government interests, while others conceal racially discriminatory intent. The Board asserts that because their policy is race-neutral on its face, it is exempt from strict scrutiny. To support this claim, the Board compares their admissions policy to the zoning policies of a suburb of Chicago, Arlington Heights. It also claims their admissions policy is akin to a policy created by the State of Massachusetts favoring veterans in its hiring practices. We consider these arguments in turn.

In *Arlington Heights*, a village adopted a zoning plan that prohibited the construction of large, multi-unit, housing complexes. *Id.* at 257. They did so to keep property values high. *Id.* at 260. Metropolitan Housing Development Corp ("MHDC") wanted to build a large, racially integrated, complex in the town. *Id.* at 254. They applied for an exception to the local zoning ordinance. The town denied the permit, and MHDC sued. *Id.* The Court ruled in favor of the village and said that for an Equal Protection Claim to be upheld, MHDC must prove that the law was motivated by discriminatory *purpose*, and the law had a discriminatory impact. *Id.* at 265. The policy of the village had an adverse impact on the ability of minorities to access housing in the area, but there was no evidence that this impact was the goal of the policy – to the contrary, the village of Arlington Heights had a long-standing interest in preserving property value and

allowing multi-unit housing complexes worked against that goal.

In the next case the board presents to support their position, the State of Massachusetts enacted a policy favoring veterans in hiring for civil service positions. *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 256 (1979). This policy disproportionately impacted women. *Id.* The Supreme Court held the Massachusetts policy was enacted "in spite of" and not "because of" its discriminatory impact, and therefore, lacked the requisite intent for an Equal Protection violation. *Id.* at 279.

When we compare these two cases from over forty years ago with the process leading up to the formation of the FCSB admissions policy, we see a different situation. FCSB communicated its intent to affect the racial makeup of TJ on the record. In contrast, The State of Massachusetts and the Village of Arlington Heights were pursuing legitimate government purposes, unrelated to race or gender, which had incidental effects on race and gender. Affecting the racial makeup of TJ was not an incidental effect of the FCSB policy, it was the express intent. The race-neutral policies in *Arlington Heights* and the gender-neutral policies in *Feeney,* survived scrutiny precisely because they had no intention of producing a disproportionate outcome on either race or gender. This makes the FCSB policy fundamentally distinguishable from the policies at issue in *Arlington Heights* and *Feeney.*

Having concluded that the admissions policy created by FCSB is not immune from scrutiny because the language of the policy is "race-neutral," we next need to determine if the board is entitled to deference because its policy promotes

diversity. FCSB argues that every Court of Appeals to consider a race-neutral measure promoting diversity has upheld the measure under rational basis review. If true, this claim would carry substantial weight. We will look at the cases FCSB cites to support this proposition.

The First Circuit heard a case involving a race-neutral school admissions policy in *Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of City of Bos.*, 996 F.3d 37, 45 (1st Cir. 2021). While the policy had a racially disparate impact, the court saw *no* record evidence of racially discriminatory intent. Again, in *Doe ex rel. Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524 (3d Cir. 2011), the Third Circuit concluded the school's redistricting plan was constitutional because, "it does not have a racially discriminatory purpose" *Id.* at 529. The court applied the *Arlington Heights* test and held that the plan was not implemented with racially discriminatory intent. Yet again in *Spurlock v. Fox*, 716 F.3d 383, 400 (6th Cir. 2013), the court saw no record evidence that the rezoning plan developed by the school was created with the intent to racially diversify the school.

The D.C. Circuit case cited by the Board makes clear that the reason the court did not apply strict scrutiny to the statute was because the issue was not properly before the court. *Rothe Dev., Inc. v. United States Dep't of Def.*, 836 F.3d 57, 72 (D.C. Cir. 2016).

Finally, The Second Circuit evaluated a hiring plan designed to correct racial imbalances. *Hayden v. Cnty. of Nassau*, 180 F.3d 42 (2d Cir. 1999). This decision supports the Board's position. It upheld a hiring plan that was designed to increase the hiring of Blacks, but used racially neutral

language. The Board relies on the Second Circuit by arguing that the plan did not have impermissible racial intent because the negative effects the policy had on White and Latino applicants were merely unintended consequences that sprung from their desire to favor Black applicants. But this reasoning would justify racial discrimination against Black applicants because of their race in fields where they are overrepresented on the basis that the policies merely favor White applicants and are not intended to discriminate against Black applicants. Accordingly, we decline to adopt *Hayden*'s reasoning.

Having reviewed all the cases purported to support rational basis review, we conclude that only one of them actually supports the Board's position, but for the reasons explained, we decline to adopt the reasoning of that case.

B.

A facially race-neutral policy must be evaluated under the *Arlington Heights* test to determine if the policy is actually motivated by impermissible discriminatory intent.

The test put forward by the Supreme Court in *Arlington Heights* has four factors for lower courts to evaluate: (1) the impact of the action, (2) the historical background of the decision, (3) the specific sequence of events leading up to the challenged classification, and (4) the legislative history surrounding the adoption of the policy. 429 U.S. at 266-268. We hold that the district court correctly applied the test established in *Arlington Heights*.

First, the data set needed to prove a policy had a racially disparate impact varies from case to case. In this case, the

district court accepted year over year statistics provided by the Coalition as valid evidence of disparate impact. This year over year data shows a substantial change in the racial makeup of the school after the policy was implemented. A 19% reduction in Asian attendance combined with a 288% increase in Hispanic enrollment and a 500% increase in Black enrollment is sufficient to create a rebuttable presumption that the policy caused this effect. FCSB suggests that other factors may have caused this change but submit insufficient evidence to overcome that presumption.

Second, the Coalition's brief provides factual context which suggests there were outside forces pressuring the Board to change the racial makeup of TJ. This evidence weighs in the Coalition's favor on the second factor. Next, evidence that the Board deviated from its normal operating procedures to pass the new admissions policy weighs against the Board on the third factor of the test.

Finally, and most importantly, is the legislative history presented by the Coalition. If the legislative history were the only evidence submitted, it would be sufficient to show that the Board intended a racially disparate outcome when they adopted their "race-neutral" plan. Counsel for FCSB suggests that the racially motivated comments by individual board members during the formation of the plan should not be attributed to the board as a whole. However, we need not make that leap. The Board itself adopted a resolution on October 6, 2020, stating their goal was, "to have TJ's demographics represent the region." This, combined with individual comments of Board Members seeking to improve Black and Hispanic admission, strongly suggests one of the

Board's goals was to have TJ's *racial* demographics represent the region.

Race conscious admissions policies are permitted if they survive strict scrutiny. That is, they must serve a compelling government interest, and be narrowly tailored to achieve that interest. FCSB makes this evaluation difficult. Normally, when a court evaluates a policy designed to promote diversity, the goal and means are openly and honestly stated. That is not the case here. The degree to which FCSB wants to change the racial makeup of the school cannot be fully evaluated because they deny the new school admissions plan was designed to accomplish that. Nevertheless, we will apply strict scrutiny to the evidence in the record.

The first part of the test for strict scrutiny requires the Board to prove that they were acting to fulfill a compelling government interest. The Supreme Court holds that diversity is a compelling interest. *Grutter* 539 U.S. at 307. Racial balancing, however, is not. *Fisher*, 570 U.S. at 311 (quoting *Grutter*, 539 U.S. at 330). Some statements by FCSB suggest that their goal was to balance the racial makeup of TJ with the Northern Virginia community. Additionally, the Board's vote to pass a resolution requiring the Superintendent to state in the annual diversity report, "the goal is to have TJ's demographics represent the region," is compelling evidence that a constitutionally impermissible purpose was at least *one* of the purposes the Board had in mind when it developed the new admissions policy.

Even if the Board had a constitutionally permissible purpose, the plan does not satisfy the second part of the strict scrutiny test. The second part of the test evaluates whether the

policy was narrowly tailored to achieve the compelling interest. *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 202 (1995). We hold that it was not. The Board's policy did away with the core test that evaluated the merit of applicants and instead distributed seats according to geographic region. Such a drastic change in an admissions policy, for the sake of improving diversity, is not the type of narrow tailoring approved of in *Fisher.*

* * *

The new admissions plan formed by FCSB fails the Supreme Court's *Arlington Heights* test. FCSB's desire to have the racial makeup of the school match the racial makeup of the region is a constitutionally impermissible purpose. Even if the purpose were constitutional, the plan for achieving it was not narrowly tailored. The plan violates the promise of Equal Protection of the law guaranteed by the 14th Amendment to the United States Constitution. For all of these reasons, the judgment of the district court is AFFIRMED.

Applicant Details

First Name	**Zachary**
Last Name	**Weiner**
Citizenship Status	**U. S. Citizen**
Email Address	**zrw9@pitt.edu**
Address	**Address** **Street** **4609 Bayard St Apt 76** **City** **Pittsburgh** **State/Territory** **Pennsylvania** **Zip** **15213** **Country** **United States**
Contact Phone Number	**7708426201**

Applicant Education

BA/BS From	**Georgia Southern University**
Date of BA/BS	**May 2021**
JD/LLB From	**University of Pittsburgh School of Law** **https://www.law.pitt.edu/**
Date of JD/LLB	**May 5, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Journal of Law and Commerce**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Wildermuth, Amy
amy.wildermuth@pitt.edu
Fisher, D. Michael
dmf18@pitt.edu
Oh, Peter
poh@pitt.edu
(412) 648-1101

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Zachary Weiner
4609 Bayard St. Apt 76
Pittsburgh, PA 15213

June 7, 2023

The Honorable Juan R. Sánchez
14613 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Dear Judge Sánchez:

I am writing to apply for a 2024-2025 clerkship with your chambers. I am currently a 3L at the University of Pittsburgh School of Law. I intend to sit for the Pennsylvania UBE bar exam following my graduation in 2024.

As an aspiring public interest attorney with experience in immigration during law school, I believe I would make a strong addition to your chambers. My work experience reflects a commitment to advocating for marginalized immigrant communities as well as honing the skills necessary to make me an effective advocate and judicial clerk. This year I will continue my work in the University of Pittsburgh School of Law Legal Immigration Clinic where I am further developing my advocacy and writing skills arguing a defensive asylum case for five siblings in immigration court.

My resume, unofficial law school transcript, and writing sample are submitted with this application. Pitt Law will submit my recommendations from Professors Wildermuth and Oh and Judge Fisher under separate cover. I would welcome the opportunity to interview with you and look forward to hearing from you soon.

Respectfully,

Zachary R. Weiner

Zachary R. Weiner

Pittsburgh, PA 15213 • (770) 842-6201 • zrw9@pitt.edu

EDUCATION

University of Pittsburgh School of Law, Candidate for J.D., May 2024
Journal of Law and Commerce, *Associate Editor*
GPA: 3.354 Legal Writing Grade: A-
Honors: Dean's Scholarship
Activities: Jewish Law Students Association, *President*

Georgia Southern University, B.B.A. Management, *cum laude*, May 2021
GPA: 3.6
Honors: Honors College Scholar
Activities: Southern Ambassadors, Training Coordinator
Study Abroad: Universidad del Norte, Barranquilla, Colombia, June-July 2019

EXPERIENCE

Jewish Family and Community Services, *Lawyers' Fund Fellow*, May 2023-August 2023
- File I-360 forms seeking Special Immigrant Juvenile status for JFCS clients
- Draft motions including a pro se change of venue

Pitt Law Immigration Law Clinic, *Student Attorney*, January 2023-Present
- Act as primary attorney for a consolidated case of five siblings currently in removal proceedings including a Master Calendar Hearing and an Individual Merits Hearing in November
- Collaborate with other client students in filing an asylum application for an Afghan national
- File for an adjustment of status for a clinic client under the Cuban Adjustment Act

University of Pittsburgh School of Law, *Research Assistant* Professor Kevin Ashley, July -August 2022
- Conducted research enabling a machine learning system to automatically identify factors of suspicion used by police officers and courts to determine if there was reasonable suspicion to justify canine sniffs for drugs in automobile stops
- Utilized on-line environment to identify and highlight sentences in relevant U.S. precedent indicating factors of suspicion
- Reviewed legal cases to confirm relevance and collaborate with other research assistants to resolve disputed case annotations

University of Pittsburgh School of Law, *Research Assistant* Professor Amy Wildermuth, July 2022-August 2022
- Supported research analyzing preliminary injunctions issued by federal district courts in all fifty states for the presence of *Winter v. NRDC* factors
- Designed a method of coding information gathered from case annotations into a data spreadsheet

United States Court of Appeals for the Third Circuit, Pittsburgh, PA, *Judicial Intern for The Hon. D. Michael Fisher*, May -June 2022
- Summarized circulating opinions of the Third Circuit
- Drafted nonprecedential opinion regarding the application of Pennsylvania tolling practices to time barred claims
- Researched retroactive application of new criminal law standard across circuits
- Attended June sitting with Judge Fisher in Philadelphia and viewed oral argument for three civil cases and one criminal case

Splash in the Boro, Statesboro, GA, *Guest Service Agent*, May 2021-July 2021
- Communicated in Spanish with Hispanic customers and via public park announcements and ticket transactions
- Sold daily tickets and season passes to water park, made reservations via phone, stocked retail displays, and cleaned and arranged water park features

Georgia Southern University, Statesboro, GA
Training Coordinator, Southern Ambassadors, June 2020-May 2021
- Trained student ambassadors providing campus tours to VIPs, prospective students and faculty
- Revised and updated the Southern Ambassador Training Manual to include new Covid-19 protocols
- Designed and implemented mentoring program for student ambassadors providing student and VIP campus tours

Resident Advisor, Department of University Housing, August 2018-May 2021
- Drafted annual roommate contracts, mediated conflicts between roommates and rooms, and prepared incident reports
- Planned and hosted biweekly professional development events for staff and mentored freshmen undergraduate students
- Supported freshmen undergraduate students by serving as a link to broader campus resources

SKILLS
- Spanish (Intermediate)
- Presented organizational behavior research at Georgia Southern's Honors Symposium (May 2021) and market predictions for the music industry at the Far West Pacific Pop Culture Conference (February 2018)

INTERESTS
- Latin music and culture, basketball, golf, college football, video games, reading, travel

GRADUATE/PROFESSIONAL ACADEMIC RECORD

Zachary R Weiner
Student ID: 4490905

University of Pittsburgh

Institution: University of Pittsburgh
4200 Fifth Avenue
Pittsburgh, PA 15260
Print Date: 06/06/2023

Birthdate: 10/13/1998
Student Address: 2310 Hampton Park Court
Buford, GA 30519

Beginning of Law Record

Fall Term 2021-2022
Program: School of Law
Plan: Law Major

Course		Description	Attempted	Earned	Grade	Points
LAW	5020	CONTRACTS	4.00	4.00	B	12.000
LAW	5028	TORTS	4.00	4.00	B	12.000
LAW	5032	LEGISLATION AND REGULATION	3.00	3.00	A-	11.250
LAW	5046	CRIMINAL LAW	3.00	3.00	B+	9.750
		Term GPA: 3.214 Term Totals:	14.00	14.00		45.000
		Cum GPA: 3.214 Cum Totals:	14.00	14.00		45.000

Spring Term 2021-2022
Program: School of Law
Plan: Law Major

Course		Description	Attempted	Earned	Grade	Points
LAW	5024	PROPERTY	4.00	4.00	A-	15.000
LAW	5033	CIVIL PROCEDURE	4.00	4.00	B-	11.000
LAW	5062	PITT LAW ACADEMY	0.00	0.00	S	0.000
LAW	5076	LEGAL ANALYSIS AND WRITING	4.00	4.00	A-	15.000
LAW	5101	CONSTITUTIONAL LAW	4.00	4.00	B-	11.000
		Term GPA: 3.250 Term Totals:	16.00	16.00		52.000
		Cum GPA: 3.233 Cum Totals:	30.00	30.00		97.000

Fall Term 2022-2023
Program: School of Law
Plan: Law Major

Course		Description	Attempted	Earned	Grade	Points
LAW	5103	EVIDENCE	3.00	3.00	B	9.000
LAW	5112	BUSINESS ORGANIZATIONS	3.00	3.00	B+	9.750
LAW	5138	FEDERAL APPELLATE ADVOCACY	3.00	3.00	A-	11.250
LAW	5154	FEDL HABEAS CORPUS, HIST PRAC	2.00	2.00	B	6.000
LAW	5386	FOUNDATIONS OF LEGAL RESEARCH	1.00	1.00	A	4.000
Course Attributes:		Online Asynchronous				
LAW	5510	SUPREME COURT PRACTICE	3.00	3.00	A	12.000
LAW	5911	JOURNAL OF LAW AND COMMERCE	1.00	1.00	S	0.000
		Term GPA: 3.467 Term Totals:	16.00	16.00		52.000
		Cum GPA: 3.311 Cum Totals:	46.00	46.00		149.000

Spring Term 2022-2023
Program: School of Law
Plan: Law Major

Course		Description	Attempted	Earned	Grade	Points
LAW	5105	FEDERAL INCOME TAXATION	4.00	4.00	B	12.000
LAW	5207	ANTITRUST	3.00	3.00	A	12.000
LAW	5265	LABOR LAW: PRIVATE SECTOR	2.00	2.00	S	0.000
LAW	5609	PROFESSIONAL RESPONSIBILITY	3.00	3.00	B-	8.250
LAW	5818	LAW INTERSESSION	1.00	1.00	A	4.000
Course Topic:		MINDFUL LIVING-HEALTHY LAWYER				
LAW	5880	IMMIGRATION LAW CLINIC	4.00	4.00	A	16.000
Course Attributes:		Global Studies				
		Latin American Studies				
LAW	5911	JOURNAL OF LAW AND COMMERCE	1.00	1.00	S	0.000
		Term GPA: 3.483 Term Totals:	18.00	18.00		52.250
		Cum GPA: 3.354 Cum Totals:	64.00	64.00		201.250

Fall Term 2023-2024
Program: School of Law
Plan: Law Major

Course		Description	Attempted	Earned	Grade	Points
LAW	5201	ADMINISTRATIVE LAW	3.00	0.00		0.000
Course Attributes:		LAW LAPS-Legal Reasoning/Analysis				
LAW	5686	LEGL INSTITUTIONS & HOLOCAUST	3.00	0.00		0.000
Course Attributes:		LAW DEI-Racial Just/Systems				
		LAW LAPS-Legal Reasoning/Analysis				
		LAW PE-Ethics				
LAW	5854	LAW AND ECONOMICS SEMINAR	3.00	0.00		0.000
LAW	5880	IMMIGRATION LAW CLINIC	4.00	0.00		0.000
Course Attributes:		LAW COMM-Advocacy				
		LAW COMM-Client				
		LAW COMM-Listening				
		LAW COMM-Negotiation				
		LAW COMM-O Comm				
		LAW COMM-W Comm				
		LAW DEI-Competence				
		LAW DEI-Empathy				
		LAW DEI-Racial Just/Systems				
		LAW LAPS-Legal Reasoning/Analysis				
		LAW LAPS-Problem Solving				
		LAW LAPS-Legal Research				
		LAW PE-Ethics				
		LAW PE-Professionalism				
		LAW PSD-Self Assessment				
		Term GPA: 0.000 Term Totals:	13.00	0.00		0.000
		Cum GPA: 3.354 Cum Totals:	77.00	64.00		201.250

Law Career Totals

		Cum GPA: 3.354 Cum Totals:	77.00	64.00		201.250

End of Law Record

June 14, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing to recommend Zachary (Zach) Weiner for a clerkship with you.

Zach has been in a number of my courses, including most recently my Supreme Court Practice class in Fall 2022. Zach was also one of my research assistants for the summer after his first year. In all of my interactions with Zach, I have been impressed with his deep interest in the law and his methodical approach to organizing concepts and ideas in the law. I also appreciate that he asks good questions and does not hesitate to seek out clarification. His dedicated efforts have led to a very strong upward trajectory in both his understanding and analysis of the law. In addition, while Zach has also been a good writer, I have seen terrific improvements in this past year. In fact, his final paper in our Supreme Court class on Mallory v. Norfolk Southern was one of the best of the class, earning an A in the course.

In addition to his strong legal analysis and writing skills, Zach has several other qualities that make him a good candidate for this position. First, Zach is a known and well-regarded leader in the law school. He has served as the President of the Jewish Law Student Association and, as a result, is a part of the core student leadership group at the law school. He also serves as an Editor for the Journal of Law and Commerce. Second, because he was an intern with Judge Fisher of the Third Circuit, Zach has experience working in a judicial chambers and understands the high expectations of that environment. Finally, Zach has applied to this position because he is very interested in returning to practice law in the area where he grew up and where his family is.

I recommend Zach to you without reservation. If you have any questions or would like to talk further about Zach, please do not hesitate to contact me. I would be happy to provide you with any additional information you might need.

With best regards,
Amy J. Wildermuth
Professor of Law

Amy Wildermuth - amy.wildermuth@pitt.edu

University of Pittsburgh | School of Law

University of Pittsburgh
School of Law

Barco Law Building
3900 Forbes Avenue
Pittsburgh, PA 15260
412-648-1400
law.pitt.edu

May 3, 2023

Re: Zachary R. Weiner

Dear Sirs:

I write to most highly recommend Zachary R. Weiner for a clerkship in your chambers.

I am familiar with Zach's work as I have known him since his 1L year at Pitt Law. Zach did an internship in my Judicial Chambers during May and June, 2022 and he did outstanding work. He worked with my clerks and worked with me on a PBA Supreme Court Review project among other projects.

During the Fall semester 2022, Zach was a student in two of my classes at Pitt Law. He was a very hard working and well prepared student. I was particularly impressed with his work in Federal Appellate Advocacy where he received one of the highest grades on the draft opinion which served as the Final Exam.

Zach is from Georgia and graduated from Georgia Southern University. He came to Pitt as it was important to him with his undergraduate major in Management to learn at a Law School situated in a city with healthy experiences in management labor relations. Zach has used his background and undergraduate experiences as the Associate Editor on the Journal of Law and Commerce. He has also shown his leadership qualities by serving as President of the Jewish Law Students Association. He has also served as a research assistant for the Pitt Law Dean and then a second member of the faculty.

From May 2023 thru August 2023, Zach has chosen to intern as a Meehan Citizenship Fellow for Jewish Family and Community Services. He will be working with young people on juvenile visas and other family and immigration services provided by the organization. His ability to speak and understand Spanish will be a great asset to his work.

I am very impressed with Zach and know how much he wants to become a member of the legal profession. His goal is to be a litigator with an eventual emphasis on appellate work. A clerkship in your Chambers will be extremely beneficial to his career. I am confident he will do outstanding work and that you will enjoy having Zach as a part of your Chambers.

If I can provide any additional information, please contact me (dmf18@pitt.edu).

Respectfully submitted,

D. Michael Fisher
Distinguished Jurist Fellow, Pitt Law
Senior Judge, U.S. Court of Appeals, 3rd Circuit

University of Pittsburgh | School of Law

Peter B. Oh
University of Pittsburgh
School of Law
Barco Law Building
3900 Forbes Avenue
Pittsburgh, PA 15260
412-648-1101
law.pitt.edu

20 June 2023

VIA FIRST CLASS MAIL

Re: Letter of Recommendation for Mr. Zachary R. Weiner

Your Honor:

I am a Professor of Law & John E. Murray Faculty Scholar at the University of Pittsburgh School of Law. I write this letter in support of Mr. Zachary Weiner's application for a clerkship with Your Honor. In short I enthusiastically and unequivocally recommend Mr. Weiner.

Mr. Weiner was a student in my Spring, 2023 Antitrust course, in which he received an A, the highest graded awarded. Unlike traditional lecture-based courses, Antitrust is a course that requires students to work in teams for two simulations; for each of these simulations, students must prepare a brief and also participate in an oral argument and then a negotiation session. Mr. Weiner's grade clearly reflects that he was an outstanding student within the course, someone who was able to master Supreme Court doctrine in an area that is widely acknowledged to be both interdisciplinary and schizophrenic; he always was prepared not only to discuss the assigned readings, but also to have sophisticated thoughts about the topic that reflected a deeper understanding of the relevant law as well as a critical appraisal of the seminal academic literature. Mr. Weiner's aptitude within the subject is surpassed only by his performance during the simulations; his skills in oral advocacy and collaborative problem-solving were among the best in the class, one which his peers also recognized.

Moreover, I have had the privilege of working with Mr. Weiner on his Note for the *Journal of Law and Commerce*. Early in the process he reached out to me about exploring some of the antitrust implications presented by developments within professional golf. His interest was not simply trying to find a suitable topic that would fulfill his academic credit requirements, but also result in a legitimate scholarly contribution. He has worked diligently on the note, and I believe that it ultimately will be published in a student-edited journal.

In sum I believe Mr. Weiner is an exceptional candidate for a clerkship with Your Honor. And I am confident that he has the potential to be among Your Honor's finest clerks. Please do not hesitate to contact me with any questions. I appreciate Your time and consideration.

Sincerely,

Peter B. Oh

Peter B. Oh | Professor of Law & John E. Murray Faculty Scholar | Tel: 412.648.1101 | Fax: 412.648.2648 | E-Mail: poh@pitt.edu

QUESTION PRESENTED[1]

Whether the due process clause of the Fourteenth Amendment prohibits a state from requiring a corporation to consent to personal jurisdiction to do business in the state.

ANSWERS

A state cannot require a nonresident corporation to consent to general personal jurisdiction as a condition of doing business in that State. This would be inconsistent with precedent. *See Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 131 S.Ct. 2846 (2011); *See also Daimler AG v. Bauman*, 571 U.S. 117, 134 S.Ct. 746 (2014). Any precedent that relies on the territorial approach of *Pennoyer* era did not survive *International Shoe* and should not be relied on in the present case. *See Shaffer v. Heitner*, 433 U.S. 186, 212, 213 n.39 (1977) ("[A]ll assertions of state-court jurisdiction must be evaluated according to . . . *International Shoe* and its progeny . . . . To the extent that prior decisions are inconsistent with this standard, they are overruled."). In the present case, there is implied consent that is unfair to Norfolk Southern and contains no reasonable connection to Pennsylvania as a forum. *Cf. Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 111 S.Ct. 1522, (1991) (holding a forum selection clause must be fundamentally fair, give notice to each party, and have a reasonable forum connection). Moreover, allowing Norfolk Southern's implied consent to stand violates the unconstitutional conditions doctrine. The Court should affirm the holding of the Supreme Court of Pennsylvania.

ANALYSIS OF ARGUMENTS

I. Ruling for Mallory does not comport with modern personal jurisdiction doctrine

Modern personal jurisdiction doctrine has specific jurisdiction as "the centerpiece of modern jurisdictional theory, while general jurisdiction plays a reduced role." *Goodyear*, 564 U.S.

[1] This sample is a portion of a larger paper written for my Supreme Court Practice course. The paper was a mock bench memo to Justice Kagan concerning *Mallory v. Norfolk Southern Ry. Co.*

at 925. Specific jurisdiction focuses on a defendant's contacts within a forum, *Id.* at 923-24, while general jurisdiction allows "any and all claims," even those with no forum connection. *Id.* at 919. Due to this, "[g]eneral jurisdiction is a rarer beast." Brief for Respondent at 14. General jurisdiction serves one "essential function: providing one forum where a defendant may always be sued." Mary Twitchell, *The Myth of General Jurisdiction*, 101 Harv. L. Rev. 610, 667 (1988). For a corporation, this forum is where it is "essentially at home." *Goodyear*, 564 U.S. at 919. General jurisdiction requires contacts "so substantial and of such a nature as to justify" a state having all-purpose authority over a defendant. *Id.* at 919, 924. The two locations where there is general jurisdiction over corporations are "the place of incorporation and principal place of business." *Daimler*, 571 U.S. at 137. A corporation is not at home when it "engages in a substantial, continuous, and systematic course of business . . . [because such a] formulation . . . is unacceptably grasping." *Daimler*, 571 U.S. at 138.

General jurisdiction does not apply in the present case. Norfolk Southern is a Virginia company whose principal place of business is Virginia. *Mallory*, 266 A.3d at 558. As such, it is "at home" in Virginia. *Goodyear*, 564 U.S. at 919. Finding general jurisdiction from a mandatory corporate registration statute goes beyond what the Court recognized as "unacceptably grasping." *Daimler*, 571 U.S. at 138. It would allow a state to assert general jurisdiction over a corporation who "engages in a substantial, continuous, and systematic course of business," *Daimler*, 571 U.S. at 138, rather than limiting general jurisdiction to forums where the corporation is "at home." *Daimler*, 571 U.S. at 139; *Goodyear*, 564 U.S. at 919. This does not comport with *Goodyear* and *Daimler* because that "formulation . . . is unacceptably grasping." *Id.*

Mallory claims that "*International Shoe*, *Goodyear*, and *Daimler* all addressed whether a *non*-consenting defendant's contacts within a forum are sufficient to support personal

jurisdiction." Brief for Petitioner at 30. He notes that "[the *International Shoe* line of cases] did not purport to address when a defendant's *consent* to jurisdiction is constitutionally valid." Brief for Petitioner at 30. This has merit. Pennsylvania's statutory scheme lacks express consent, *See infra* § III.A, but there is a form of implied consent. *See infra* § III.B. The implied consent Norfolk Southern gave in registering is no different than consent given to a forum selection clause in a standard form contract. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 111 S.Ct. 1522, (1991) (holding a forum selection clause was a permissible form of personal jurisdiction). Therefore, consent in this case should be analyzed under *Carnival Cruise*. *See infra*, § III.B.1

II. Is There is Consent Within the Pennsylvania Statutory Scheme

The "Court has recognized [that consent] is not a monolithic concept." Brief of Professor Brilmayer at 10. Various "legal arrangements have been taken to represent express or implied consent to the personal jurisdiction of the court." *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703-04 (1982). *Bauxites* listed such legal arrangements: a forum selection clause, a stipulation, an arbitration agreement, certain state court "procedures which find constructive consent" from participating in litigation, and failure to assert a jurisdictional defense. *Id.* at 704. These arrangements "reflect the defendant's voluntary consent to jurisdiction," Brief of Professor Brilmayer at 11, therefore, they "provide an independent basis for jurisdiction, separate from the minimum-contacts test." *Id.* Among the arrangements listed, corporate registration cannot be found. "If consent is not monolithic, neither is it infinitely malleable." *Id.*

Registration jurisdiction is different in character from the forms of consent identified in *Bauxites*. All forms listed by *Bauxites* are case or dispute specific and do not concern a state's assertion of regulatory power against a private party. *See* Brief for Respondent at 11. "[T]raditional forms of consent are limited in scope to particular disputes . . . while consent-by-registration is all-

purpose." Brief for Professor Brilmayer at 12 (quoting Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 Cardozo L. Rev. 1343, 1383-87 (2015)). Furthermore, a majority of the examples listed in *Bauxites* concern express consent which is not present in this case. *See infra* § III.A (discussing lack of express consent).

A. Is There Implied Consent

The "Court has recognized that in appropriate cases, consent may be implied from actions that are not themselves intended as communications of agreement." Brief of Professor Brilmayer at 16. Consent may be implied only when an actor's conduct "logically support[s] the inference of consent to jurisdiction." Monestier, *supra*, at 1394. Furthermore, "the implication must be predictable to be fair." Monestier, *supra*, at 1394 (quoting *WorldCare Ltd. Corp. v. World Ins. Co.*, 767 F. Supp. 2d 341, 355 (D. Conn. 2011)). "In other words, there must be a reasonable trigger that suggests a willingness to consent." Brief for Professor Brilmayer at 16.

Norfolk Southern claims that there is no reasonable trigger in this case. *See* Brief for Respondent at 12; *accord* Brief of Professor Brilmayer at 17. This claim lacks merit. "[E]veryone is presumed to know the law," *Parker v. Levy*, 417 U.S. 733, 751 (1974), including the ground on which a state will assert jurisdiction. Thus, "Norfolk Southern consented to the jurisdiction of Pennsylvania's courts by registering." Reply Brief at 3. While the statutory scheme lacks any explicit mention of consenting to jurisdiction, *See supra* § III.A, "[t]he effect of [Norfolk Southern's registration] under Pennsylvania law was clear." Reply Brief at 3. Norfolk Southern is a sophisticated party who understood what the effect of registering in Pennsylvania would mean. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 484-85 (1985) (explaining that Rudzewicz was a sophisticated businessman who, through counsel, had sufficient notice that he would be subject to suit in Florida). Therefore, Norfolk Southern gave a form of implied consent.

1. The *Carnival Cruise* Test Applies to this Case

Norfolk Southern's consent via registration is no different than a passenger's consent to a forum selection clause for a cruise ship. *Cf. Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 587-88, 111 S.Ct. 1522, 1524 (1991). Every nonresident corporation must register to do business in Pennsylvania, *See* Pa.C.S. § 411, just as every passenger on a cruise must purchase a ticket. In both cases, this action gives consent to personal jurisdiction. *See* Pa.C.S. § 5301(a)(2)(i) (stating that qualification as a foreign corporation under Pennsylvania law is a sufficient basis for general jurisdiction); *See also Carnival Cruise*, 499 U.S. at 593 (explaining Carnival Cruise's forum selection clause was "purely routine and doubtless nearly identical" to every party). Due to the similarities between registration jurisdiction and a forum selection clause in a standard form contract, *Carnival Cruise* applies to this case.

Carnival Cruise states that a forum selection clause "[is] subject to judicial scrutiny for fundamental fairness." *Id.* at 595. The test outlined in *Carnival Cruise* mandates courts to look to whether the clause is fundamentally fair, whether there was noticeable agreement between the parties, and whether there is a reasonable connection to the forum. *Id.* Noticeable agreement is not an issue in this case. Norfolk Southern is a sophisticated party, *See Burger King*, 471 U.S. at 484-85, who understood what the effect of registering in Pennsylvania would mean under Pennsylvania law. The remaining inquires under *Carnival Cruise* are whether Pennsylvania's regulatory scheme is fundamentally fair and whether there is a reasonable forum connection to Pennsylvania.

2. Application of *Carnival Cruise* to This Case

The Court used several factors to analyze the fundamental fairness of the forum selection clause. These factors can be divided into two categories: those determining whether there was bad faith and those determining the reasonableness of the forum selection clause. To determine

whether there was bad faith, the Court looked to whether the forum selection clause was used "as a means of discouraging cruise passengers from pursuing legitimate claims," whether "[Carnival Cruise] obtained [the passengers'] accession to the forum clause by fraud or overreaching," and whether there was notice of the forum provision. *Carnival Cruise*, 499 U.S. at 595. To determine the reasonableness of the forum selection clause, the Court looked to whether Carnival Cruise had an "interest in limiting the fora [where] it . . . could be subject to suit," whether the forum selection clause helped eliminate "any confusion about where suits arising from the contract must [have been] brought and defended," and whether the forum selection clause passed any benefit onto the passengers. *Carnival Cruise*, 499 U.S. at 593-94.

When applied to the present case, the factors determining bad faith show that there is no evidence of bad faith in Pennsylvania's statutory scheme. The registration statute and long-arm statute are not used "as a means of discouraging . . . legitimate claims." *Carnival Cruise*, 499 U.S. at 595. Indeed, the combination of statutes serves to increase the number of legitimate claims that may be brought in Pennsylvania courts. Statutes requiring nonresident corporations to register in the state do not fit into traditional notions of fraud or overreaching. There is nothing to suggest Pennsylvania mislead Norfolk Southern in order to obtain general personal jurisdiction over them. Norfolk Southern had sufficient notice that registering to do business in Pennsylvania would subject them to suit in Pennsylvania. *See supra* § III.B; *See also Burger King*, 471 U.S. at 484-85 (explaining sophisticated parties have equal bargaining power when entering a contract).

The factors that determined the reasonableness of the forum selection clause counsel ruling in favor of Norfolk Southern. Norfolk Southern has an "interest in limiting the for a [where] it . . . could be subject to suit." *Carnival Cruise*, 499 U.S. at 593. Pennsylvania's statutory regime has the opposite effect. It adds an additional forum where Norfolk Southern could be subject to suit.

Moreover, Pennsylvania's statutory scheme creates "confusion about where suits . . . must be brought and defended." *Carnival Cruise*, 499 U.S. at 594. Norfolk Southern is incorporated in Virginia and has its principal place of business in Virginia, *Mallory*, 266 A.3d at 558, so it should only expect suits asserting general jurisdiction to be brought in Virginia. *See supra* § II. Norfolk Southern does obtain a benefit from registering, *See* 15 Pa.C.S. § 411(b) (stating corporations who fails to register forfeit the right to maintain an action or proceeding in Pennsylvania courts), but Pennsylvania may not limit this benefit to registered corporations. *See infra* § III.C.

This case also fails on *Carnival Cruise*'s mandate that there be a reasonable connection to the selected forum. Pennsylvania has no interest in the suit, *See infra* § II.A, and the only claim of personal jurisdiction Pennsylvania has is registration jurisdiction. There is no connection to Pennsylvania in this case other than Norfolk Southern's registration as a nonresident corporation in Pennsylvania. This implicates the concern the Court express in *Carnival Cruise* and *M/S Bremen v. Zapata Off-Shore Co.*: parties "resolv[ing] their essentially local disputes in a remote alien forum." *Carnival Cruise*, 499 U.S. at 594-95 (*quoting M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 17, 92 S.Ct. 1907, 1917 (1972)). Since Norfolk Southern is a Virginia company and the events that gave rise to suit occurred in Virginia and Ohio, Pennsylvania is "a remote alien forum" where Mallory is attempting "to resolve [his] essentially local [Virginia] dispute." *Id.*

3. Limitations of *Carnival Cruise*

Carnival Cruise applies due to the similarities between a forum selection clause in a contract of adhesion and corporation registration jurisdiction. However, *Carnival Cruise* has limitations in the present case. *Carnival Cruise* was rooted in contract law which carries a different presumption than statutory compliance. Parties entering a contract are presumed to be bargaining at arm's length with equal bargaining power. The same is not true for statutory compliance. Private parties do not

have equal bargaining power with the government, nor may they bargain with the government at arm's length regarding statutory compliance. All private parties must comply with the law. Due to the difference in presumptions, the Court may hold that consent to jurisdiction is only permissible in contract; however, this would ignore another limitation of *Carnival Cruise*.

Carnival Cruise Court allowed the forum selection clause to stand despite the lack of bargaining because it found the forum selection clause reasonable. *See Carnival Cruise*, 499 U.S. at 593-95. This "involve[d] the intersection of two strands of traditional contract law [which] qualif[ied] the general rule that courts will enforce the terms of a contract as written." *Carnival Cruise*, 499 U.S. at 600 (Stevens, J., dissenting). However, "courts traditionally have reviewed with heightened scrutiny the terms of contracts of adhesion." *Id.* The Court should reexamine the reasoning of *Carnival Cruise* because, as Justice Stevens observed, "the adhering party generally enters into [contracts of adhesion] without manifesting knowing and voluntary consent to all their terms." *Carnival Cruise*, 499 U.S. at 600 (citing Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 Harv. L. Rev. 1173, 1179-80 (1983); Slawson, *Mass Contracts: Lawful Fraud in California*, 48 S. Cal. L. Rev. 1, 12-13 (1974); K. Llewellyn, *The Common Law Tradition* 370-71 (1960)).

Consent to jurisdiction was common in the *Pennoyer* era's territorial approach. As Mallory claims "[t]he historical record is clear: before and in the years just after 1868, every State required out-of-state corporations to consent to jurisdiction in the State's courts as a condition of doing business in the State." Brief for Petitioner at 12. However, "all assertions of state-court jurisdiction must be evaluated according to the standard set forth in International Shoe and its progeny." *Shaffer v. Heitner*. While *Carnival Cruise* was decided after *International Shoe*, its reasoning is based on consent which does not fit squarely into the contacts focused inquiry of modern personal

jurisdiction theory. Furthermore, it is unlike "tag" jurisdiction because it is not "a jurisdictional principle is both firmly approved by tradition and still favored." *Burnham v. Superior Court of Cal.*, 495 U.S. 604, 622, 110 S.Ct. 2105, 2116; *But see Carnival Cruise*, 499 U.S. at 601-02 (Stevens, J., Dissenting) (explaining forum-selection clauses were invalid under traditional common law rules as contrary to public policy, but the rule has declined following *Bremen*). Thus, consent to jurisdiction does not seem to fit into modern personal jurisdiction doctrine.

However, eliminating consent to jurisdiction entirely poses additional problems. "[A] valid forum selection clause . . . represents the parties' agreement as to the most proper forum," *Atlantic Mar. Constr. Co. v. United States Dist. Ct. for the W. Dist. Of Tex.*, 571 U.S. 49, 63 (2013), and "the general rule [is] that courts will enforce the terms of a contract as written." *Carnival Cruise*, 499 U.S. at 600 (Stevens, J., Dissenting). Parties that have equal bargaining power should be able to negotiate "the most proper forum." *Atlantic Mar.*, 571 U.S. at 63. Moreover, "standardized form contracts account for a significant portion of all commercial agreements." *Carnival Cruise*, 499 U.S. at 600 (Stevens, J., Dissenting). Eliminating standardized form contracts would void hundreds of thousands of contracts and be a detriment to judicial economy as courts would begin to hear numerous cases concerning standardized form contracts.

To resolve the issue in dispute in this case and the issues present in *Carnival Cruise*, a reformulation of *Carnival Cruise*'s test is required. The focus should be on the reasonableness of the agreement and should only apply when one party has little to no bargaining power. When one party has little to no bargaining power, courts should look to whether the consent to jurisdiction is objectively reasonable to the party with little to no bargaining power. Consent to jurisdiction is unreasonable when there is no connection to the forum, or when the forum selected limits the party with minimal bargaining power's ability to access justice or recover damages for loss or injury.

Important factors to consider are: (1) the ability of the party with minimal bargaining power to access the forum consented to, (2) the plausibility of the party with minimal bargaining being able to bring or defend a suit in the consented to forum, and (3) each parties' connections to the selected forum.

Applicant Details

First Name	**Jack**
Last Name	**Weisbeck**
Citizenship Status	**U. S. Citizen**
Email Address	**jackweis@buffalo.edu**
Address	**Address** Street **916 Delaware Avenue, Apartment 5C** City **Buffalo** State/Territory **New York** Zip **14209** Country **United States**
Contact Phone Number	**5854892982**

Applicant Education

BA/BS From	**Bucknell University**
Date of BA/BS	**December 2020**
JD/LLB From	**University at Buffalo Law School, The State University of New York (SUNY)** **https://www.law.buffalo.edu/**
Date of JD/LLB	**May 19, 2024**
Class Rank	**5%**
Law Review/ Journal	**Yes**
Journal(s)	**Buffalo Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Philip C. Jessup International Law Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Steilen, Matthew
mjsteile@buffalo.edu
(716) 645-7918
Semet, Amy
amysemet@buffalo.edu
McDuff, Angelyn
angelynd@buffalo.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Jack Weisbeck
916 Delaware Avenue – Apt. 5C
Buffalo, NY 14209
(585) 489-2982
jackweis@buffalo.edu

June 12, 2023

Honorable Juan R. Sanchez
United States District Judge for the Eastern District of Pennsylvania
14613 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Dear Judge Sanchez,

I am a rising 3L from the University at Buffalo School of Law, and I am excited to apply for a post-graduate clerkship in your chambers. I will make an immediate contribution to your chambers because I have experience with issues that come before federal courts. I worked on criminal, appellate, civil asset forfeiture, civil rights, and employment discrimination cases as a law clerk with the U.S. Attorney's Office for the Western District of New York. While externing with the JustCause Federal Pro Se Assistance Program, I helped plaintiffs comply with the Federal Rules of Civil Procedure. During my first few weeks as a summer associate at Hodgson Russ, I have been working on a federal class action lawsuit. Additionally, I wrote a seminar paper on a possible right to education in the Ninth Amendment, and I wrote about student athlete First Amendment rights for my law review publication competition.

I will make a positive impact in your chambers because of my teamwork abilities. During college, I was selected from a nationwide pool of applicants to participate in the Horizons Huntsman Leadership Summit. There, I learned how to use my strengths to maximize the success of the groups that I work with. I implemented these teamwork abilities on the executive board of my fraternity, where I worked with four others to oversee a group of 95-100 active members. As a team, we navigated the beginning of the COVID-19 pandemic. Further, I used my teamwork abilities as an assistant captain of the Bucknell Club Hockey Team, where I ensured that my teammates were calm and confident in stressful situations. My teamwork abilities will allow me to collaborate with chambers staff to produce quality work, even under stressful conditions.

I plan to use what I learn in a clerkship to advocate for free speech and free expression rights. Through a clerkship, I would like to continue to grow as a writer and develop a network of talented mentors who I can learn from throughout my practice of law. It would be an honor to have the opportunity to learn from you while I begin my legal career. I sincerely thank you for your time and consideration.

Very Respectfully,

Jack Weisbeck
Enc.

References

Professor Matthew Steilen – Constitutional Law and Federal Courts Professor
724 O'Brian Hall, North Campus
Buffalo, NY 14260
716-645-8966
mjsteile@buffalo.edu

Associate Professor Amy Semet – Civil Procedure Professor
522 O'Brian Hall, North Campus
Buffalo, NY 14260
716-645-8162
amysemet@buffalo.edu

Lecturer in Law Angelyn McDuff – Legal Analysis, Writing, and Research Professor
722 O'Brian Hall, North Campus
Buffalo, NY 14260
716-645-8182
angelynd@buffalo.edu

Assistant United States Attorney Grace Carducci
100 State Street
Rochester, NY 14614
585-263-6760
Grace.Carducci@usdoj.gov

Assistant United States Attorney Kyle Rossi
100 State Street
Rochester, NY 14614
585-263-6760
Kyle.Rossi@usdoj.gov

Jack Weisbeck

Buffalo, NY | 1-585-489-2982 | jackweis@buffalo.edu

Education

UNIVERSITY AT BUFFALO SCHOOL OF LAW **Juris Doctor expected 2024**
GPA: 3.9, Top 5%
Articles Editor on the *Buffalo Law Review*
Competed with the UB Jessup Moot Court Team at the New York Regional
- Awards: 16th Best Oralist (out of 62); 6th Best Written Team Submission (out of 17)
- Vice President of the UB Jessup Moot Court Board

CALI Award recipient: earned the highest grade in Constitutional Law II
Torts Teaching Assistant Fall 2023

BUCKNELL UNIVERSITY **Bachelor of Arts, *cum laude*, December 2020**
Major: Economics | GPA: 3.5
Sigma Chi Horizon's Leadership Summit: selected to spend a week learning and practicing different leadership styles.
Sigma Chi Fraternity Executive Board Member
Political Economy Teaching Assistant Fall 2019

Legal Experience

SUMMER ASSOCIATE | HODGSON RUSS LLP | SUMMER 2023
- Working on a wide variety of legal matters at an AmLaw 200 Firm in Buffalo, NY.

RESEARCH ASSISTANT | PROFESSOR CHRISTINE P. BARTHOLOMEW | SUMMER 2023
- Performing advanced research on civil procedure and antitrust law.
- Making grammatical and stylistic edits to academic articles in preparation for their submission.

EXTERN | JUSTCAUSE | SPRING SEMESTER 2023
- Assisted plaintiffs in the Federal Pro Se Assistance Program in Rochester, NY.
- Gained valuable experience with federal court procedures and client communications.
- Assisted prospective clients on the Tenant Defense Project Hotline.

LAW CLERK | U.S. ATTORNEY'S OFFICE FOR THE WESTERN DISTRICT OF N.Y. | SUMMER 2022
- Performed legal writing and research tasks for Assistant U.S. Attorneys in preparation for trials, motions, and appeals.
- Drafted a portion of a motion for summary judgment in a § 1983 action, which was submitted under my name.
- Drafted a motion in opposition to a sentencing appeal to be argued before the Second Circuit.
- Participated in a summer law clerk moot court where I argued on behalf of the government at a fictional detention hearing.

OFFICE ASSISTANT | LEGAL AID SOCIETY OF ROCHESTER | JULY 2016 – JANUARY 2022
- Assisted in implementation of an online document storage system.
- Gathered evidence and made home visits to assist attorneys in the Attorney for the Child Unit.

INTERN | MONROE COUNTY DISTRICT ATTORNEY'S OFFICE | SUMMER 2018
- Assisted attorneys by preparing discovery, monitoring police footage, and transcribing interviews for case preparation.

Interests

HORTICULTURE: GALLEA'S GREENHOUSE AND FLORIST | APRIL 2016 – PRESENT
- Assisting customers with landscaping needs.

ICE HOCKEY: TREASURER + ASSISTANT CAPTAIN | BUCKNELL CLUB HOCKEY | 2017 - 2021
- Assisted with organization of donations for annual Breast Cancer Awareness Game.

FISHING + BOATING: SOUTH BAY BOAT AND TACKLE | SUMMER 2019
- Gave safety, navigational, and operational presentations to boat renters.

Law School UNOFFICIAL Transcript

Name: **Weisbeck, Jack William**
Student ID: **5022-8921**

Date Issued: 06/08/2023

Beginning of LAW SCHOOL Record

Fall 2021

Program: Law JD
Plan: Law

Course		Description	Attempted	Earned	Grade	Points
LAW	500TUT	Legal Profession	0.000	0.000		0.000
LAW	503LEC	Contracts	4.000	4.000	A-	14.680
LAW	505LEC	Criminal Law	4.000	4.000	A	16.000
LAW	509LEC	Torts	4.000	4.000	A-	14.680
LAW	515LEC	Legal Analys, Writing & Res I	4.000	4.000	A	16.000

			Attempted	Earned	GPA Units	Points
Term GPA	3.835	Term Totals	16.000	16.000	16.000	61.360
Cum GPA	3.835	Cum Totals	16.000	16.000	16.000	61.360

Spr 2022

Program: Law JD
Plan: Law

Course		Description	Attempted	Earned	Grade	Points
LAW	500TUT	Legal Profession	1.000	1.000	S	0.000
LAW	501LEC	Civil Procedure	4.000	4.000	A	16.000
LAW	507LEC	Property	4.000	4.000	A	16.000
LAW	511LEC	Constitutional Law 1	4.000	4.000	A	16.000
LAW	516LEC	Legal Analys, Writing & Res II	3.000	3.000	A	12.000

			Attempted	Earned	GPA Units	Points
Term GPA	4.000	Term Totals	16.000	16.000	15.000	60.000
Cum GPA	3.915	Cum Totals	32.000	32.000	31.000	121.360

Fall 2022

Program: Law JD
Plan: Law

Course		Description	Attempted	Earned	Grade	Points
LAW	564LEC	Legal Ethics and Pro Respon	3.000	3.000	A	12.000
LAW	612LEC	Constitutional Law 2	3.000	3.000	A	12.000
LAW	632SEM	Academic Legal Writing I	1.000	1.000	S	0.000
LAW	639SEM	9th Amendment	3.000	3.000	A	12.000
LAW	654LEC	Business Associations	3.000	3.000	A	12.000
LAW	841LEC	Int'l Legal Advocacy	3.000	3.000	A	12.000

			Attempted	Earned	GPA Units	Points
Term GPA	4.000	Term Totals	16.000	16.000	15.000	60.000
Cum GPA	3.943	Cum Totals	48.000	48.000	46.000	181.360

Spr 2023

Program: Law JD
Plan: Law

Course		Description	Attempted	Earned	Grade	Points
LAW	529LEC	Contemplative Practice	3.000	3.000	S	0.000
LAW	600LEC	Federal Courts	3.000	3.000	A-	11.001
LAW	613LEC	Evidence	4.000	4.000	A-	14.668
LAW	633SEM	Academic Legal Writing II	2.000	2.000	S	0.000
LAW	791TUT	Externship	3.000	3.000	S	0.000
LAW	794TUT	Externship Seminar	1.000	1.000	A	4.000

			Attempted	Earned	GPA Units	Points
Term GPA	3.709	Term Totals	16.000	16.000	8.000	29.669
Cum GPA	3.908	Cum Totals	64.000	64.000	54.000	211.029

Fall 2023

Program: Law JD
Plan: Law

Course		Description	Attempted	Earned	Grade	Points
LAW	517LEC	Advanced LAWR	3.000	0.000		0.000
LAW	604LEC	Sports Law	3.000	0.000		0.000
LAW	610LEC	Criminal Pro: Investigation	3.000	0.000		0.000
LAW	810TUT	Faculty Assistantship	3.000	0.000		0.000

			Attempted	Earned	GPA Units	Points
Term GPA	0.000	Term Totals	12.000	0.000	0.000	0.000
Cum GPA	3.908	Cum Totals	76.000	64.000	54.000	211.029

Law School UNOFFICIAL Transcript

Name: **Weisbeck, Jack William**
Student ID: **5022-8921**

Law School Career Totals

			Attempted	Earned	GPA Units	Points
Cum GPA:	3.908	Cum Totals	76.000	64.000	54.000	211.029

End of Law School Record

June 13, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

Jack Weisbeck has asked me to recommend him for a clerkship in your chambers. Jack is an extraordinary candidate. His cumulative GPA of 3.92 possibly makes him the top student in his class. (We don't publish a rank, but the registrar does tell students if they are in the top 5%; faculty see the GPAs of the top graduating students, and I can report that in some years there isn't a single student with a GPA that high.) Among faculty here Jack is known for 'blowing the top off' the class curve, racking up far more points than any other student.

The writing sample shows why. Jack writes with clarity about complex issues. His memo on Name-Image-Likeness rules for student athletes gives the clearest framing of the doctrinal muddle on commercial speech that I have seen in some time. I think it's likely we will soon see a judicial opinion, along these lines, that forces universities to reconceive their "vice" industry restrictions on the student sale of name, image, and likeness. Jack points out how those restrictions are out-of-step with the handling of "vice" speech in commercial speech doctrine itself. The comparison to the Tinker standard for school speech is also persuasive, as it is very difficult to imagine sustaining a university policy that, for example, forbade student speech about gambling. The memo gives the impression of the issue being simple, but in fact it's complex and this is a mark of effective legal writing.

Jack's been a leader in the law school as well. He is articles editor on the law review. In the Jessup Moot Court (the world's largest) his team made it to a quarterfinal bracket with Columbia, Harvard, and Yale, and Jack was judged the 16th best oralist in the entire competition. I'm not surprised by any of this. In my classes Jack was always engaged and thoughtful. He has a lovely demeanor and is well-liked by his classmates.

Jack Weisbeck is distinguished among his classmates here at UB and is an excellent candidate for federal clerkship. I hope you will give him a close look.

Sincerely,

Matthew Steilen
Professor of Law
University at Buffalo School of Law
State University of New York

University at Buffalo
School of Law

June 6, 2023

Honorable Juan R. Sanchez
United States District Judge for the Eastern District of Pennsylvania
14613 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Re: Clerkship Recommendation for Jack Weisbeck

Dear Judge Sanchez:

I am writing to strongly support Jack Weisbeck's application for a federal clerkship with your chambers. I am currently an Associate Professor of Law and affiliated professor in the political science department at the University of Buffalo School of Law, State University of New York. I teach property, civil procedure, patent law, and intellectual property law. I clerked for Judge Paul Michel at the United States Court of Appeals for the Federal Circuit and am thrilled that Jack decided to apply for clerkships.

Jack is particularly interested in your chamber as he went to college at Bucknell University, and would like to return to Pennsylvania to serve the community there.

I was Jack's professor for civil procedure law while he was a student at the University of Buffalo School of Law, State University of New York during Spring 2022. Jack is an excellent student who would truly be a great clerk. He is one of our school's top students (top 5%) and is on scholarship at UB. Jack received the highest grade in the class (A) in civil procedure law, doing well in the midterms, final exam and other assessments. He consistently got the highest grade on every assessment, and his overall grade (95) was the highest in the class of over 80 students. Jack is also a very good writer. He was always prepared for class, and even read more than the assigned readings in the textbook. I forgot that I did not assign some of the notes to a case, and called on Jack that day; Jack was well versed in the material and answered all my questions, before another student chimed in noting that the material was not assigned. Jack's great performance in class led to him being asked to be a teaching assistant next year for a torts class. Teaching assistants receive academic credit, and are selected based both on their knowledge of their material and their ability to be a role model for 1Ls. I am sure Jack will do a great job in the role.

Jack is active in many student organizations which demonstrate his tremendous time management and teamwork skills. He was selected through a competitive exercise for the *Buffalo Law Review*, where he serves as the Articles Editor. In addition, while keeping up with law review and his grades, he somehow found the time to also participate and travel to the New York regional competition for the

Amy Semet
Associate Professor of Law
Affiliated Professor in Political Science
University of Buffalo School of Law
State University of New York
John Lord O'Brien Hall, Buffalo, NY 14260-1100
215-767-0041
amysemet@buffalo.edu
http://www.amysemet.com

Jessup Moot Court Competition, where he received the award for 6th best written team brief (out of 17 teams), and 16th best oralist (out of 62 participants).

Further, many of Jack's prior positions equip him with skills that might be similar to that of a clerk. This summer, he is interning at Hodgson Russ LLP, the most prestigious law firm in Buffalo, and he is also serving as a research assistant for Professor Christine Bartholomew, an antitrust, class action, and civil procedure scholar here at UB. Jack interned with the United States Attorney's Office for the Western District of New York in Summer 2022, and thus gained the experience of what it is like working for the federal government in a diverse array of subject matters. His experience there gave him the opportunity to put his civil procedure knowledge to work drafting motions and appellate briefs. Even before entering law school, Jack worked on legal matters. From 2016 to the middle of his 1L year, he worked as an office assistant at the Legal Aid Society of Rochester, where he received exposure to a wide variety of cases in service to our community. During one of the summers while he was a student at Bucknell University, Jack interned at the Monroe County District Attorney's Office, where he gained experience seeing how criminal cases operate. In all, given that he is still in law school, Jack has substantial experience in both civil and criminal cases, and is well equipped with knowing the nuances of civil procedure so as to be an asset to your chambers.

A federal clerkship would give Jack the chance to work closely with a judge to hone his legal skills, and to intimately know the nuances of the law that one can best pick up as a clerk. As one of UB's top students, Jack is eminently academically qualified. In addition, and perhaps most importantly, he would make a great colleague and team player, and be a tremendous asset to your chambers given his diligence and attention to detail as well as command of legal rules. Please feel free to contact me at amysemet@buffalo.edu or call me at 215-767-0041 if you have any questions about Jack.

Sincerely,

Amy E Semet

Amy Semet
Associate Professor of Law
University of Buffalo School of Law
State University of New York

June 14, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I had the pleasure of teaching Jack Weisbeck during his entire first year at the University at Buffalo School of Law, and it is with great enthusiasm that I write to recommend him for your law clerk position. Mr. Weisbeck was a student in my Legal Analysis, Writing, and Research (LAWR) course. During that course, he demonstrated diligence, an ability to incorporate feedback, and strong research and writing skills that will make him an exceptional law clerk.

Mr. Weisbeck outshines his peers in the diligence with which he approaches the development of his legal writing skills. However, Mr. Weisbeck did not focus specifically on one skill as many students do. Instead, he took advantage of extra opportunities to practice citation, grammar, legal research, and numerous other skills. Then, over the course of his first year, he incorporated the feedback he had received in each of these areas to create a truly impressive final brief for LAWR. After receiving feedback on his final brief, Mr. Weisbeck scheduled a meeting with me to review that feedback, demonstrating a continued commitment to improving his legal writing skills even after the school year had ended. Mr. Weisbeck's persistence in continuing to improve his legal writing skills, and his ability to implement feedback will make him an industrious law clerk.

During his first year, Mr. Weisbeck grew into a strong legal researcher with exceptional analytical abilities. The assignments Mr. Weisbeck completed for me during LAWR included topics in criminal law, copyright law, and tort law. Mr. Weisbeck's research consistently uncovered sources that allowed him to fully explore the bounds of the complex legal issues he was tasked with researching. Mr. Weisbeck's ability to analyze and research complex issues across legal disciplines makes him particularly well-suited to engage in the legal discourse of a skillful law clerk.

Mr. Weisbeck's professional demeanor also sets him apart from his peers. Every interaction I have had with Mr. Weisbeck throughout his law school career has been professional and respectful. During the many group exercises I had students complete, Mr. Weisbeck's groupmates sung his praises as a team player who was always well-prepared and easy to work with. These skills will make him a cooperative and professional addition to your staff.

Mr. Weisbeck has all the necessary skills to be an exceptional law clerk. Accordingly, it is without reservation that I recommend Jack Weisbeck for your law clerk position. I would be happy to discuss his qualifications further and can be reached at angelynd@buffalo.edu and 716-645-8182.

Sincerely,

Angelyn McDuff
Lecturer in Law, Legal Analysis, Writing and Research
Director of the LAWR Program

Jack Weisbeck
916 Delaware Avenue – Apt. 5C
Buffalo, NY 14209
(585) 489-2982
jackweis@buffalo.edu

Writing Sample

The attached writing sample is a section of my Note and Comment Article drafted for the *Buffalo Law Review* publication competition. The remainder of my Article has been omitted for brevity. My thesis was that name, image, and likeness (NIL) laws for student athletes largely violate the First Amendment and could lead to a chilling of political speech on campus. The NCAA has long required that participating athletes maintain amateurism status, which limited their financial potential. A recent Supreme Court decision, *NCAA v. Alston*, prevented the NCAA from enforcing portions of its amateurism policy on antitrust grounds. Student athletes now have greater rights to their own publicity, allowing them to receive money in exchange for the use of their NIL. At this point, there is no federal NIL regulation, and the NCAA has ceded the ability to regulate NIL to states and individual colleges. Generally, most state and college level policies include bans on student athletes using their NIL to endorse traditional vice industries and any product or service that a college deems to go against its values. I argue that these policies are not only violative of the First Amendment, but they chill political speech of student athletes. They also could provide harmful legal and social precedents for future restrictions on free speech. While my Article was not chosen for publication, it was one of the ten finalists from my associate class. As per the rules of the Buffalo Law Review Note and Comment Competition, I received no outside assistance with my writing. The remainder of my Article can happily be submitted upon request.

2. Government Imposed NIL Policies that Prohibit Defined Categories of Speech are Unconstitutional.

Vice industry restrictions violate the First Amendment because they are content based restrictions on speech that do not meet strict scrutiny. Additionally, these restrictions cannot be justified under the commercial speech doctrine.

a. Content Based or Content Neutral

The First Amendment prevents the government from restricting speech based on its content.[1] Content based restrictions receive the highest scrutiny.[2] A restriction on speech is content based when the restriction draws distinctions based on the subject matter, or message, that a speaker chooses to convey.[3] This heightened scrutiny applies even when the content that the government seeks to restrict is distasteful.[4]

In contrast, a content neutral restriction on speech is subject to a lower level of scrutiny.[5] Content neutral restrictions can be justified as time, place, and manner restrictions.[6] When the

[1] U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech"); R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992); s*ee also* Cantwell v. Connecticut, 310 U.S. 296, 307 (1940) (reasoning that the First Amendment prevents a state government from issuing a license to engage in First Amendment activities based on the state's determination of what is a worthy cause); Texas v. Johnson, 491 U.S. 397, 404 (1989) (quoting U.S. v. O'Brien 391 U.S. 367, 376, 409 (1968)) (reasoning that the First Amendment freedom of speech covers any conduct that intends to express an idea through elements of communication).

[2] *See, e.g.*, City of Austin v. Reagan Nat. Advert., LLC, 142 S. Ct. 1464, 1471 (2022) (stating that content based restrictions receive strict scrutiny); Reed v. Town of Gilbert, 576 U.S. 155, 171 (2015) (stating that strict scrutiny requires that the government prove that the restriction furthers a compelling interest, and that the restriction is narrowly tailored to that interest).

[3] *See, e.g.*, *Reed*, 576 U.S. at 164 (reasoning that a town engaged in a content based restriction by treating temporary directional signs, political signs, and ideological signs differently because of the messages that were being conveyed).

[4] *See, e.g.*, Matal v. Tam, 137 U.S. 1744, 1763 (2017) (applying this rule to a provision in the Lanham Act, which prohibited the government from registering trademarks that it deems offensive); *Johnson*, 491 U.S. at 414 ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable").

[5] *See, e.g.*, Turner Broad. Sys., v. F.C.C., 520 U.S. 180, 189 (1997) (citing United States v. O'Brien 391 U.S. 367, 377 (1996)) (stating that content neutral restrictions are permitted under the First Amendment when it advances an important government interest, other than the suppression of speech, and it does not burden more speech than necessary to achieve the important government interest);

[6] *See* City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 47–49 (1986) (reasoning that a city ordinance restricting the placement of adult entertainment theaters was an allowable time, place, and manner restriction because the ordinance is not primarily aimed at the content of the films, but rather at the secondary effects of such theaters in the community, and there were reasonable alternative locations for the theaters). *Playtime Theaters* is a

government restricts speech because of a disagreement with the message being conveyed, it is a content based restriction, not a content neutral restriction.[7]

Here, vice industry restrictions are content based because they treat vice industries differently than other subject matters.[8] Accordingly, strict scrutiny will apply.[9] Government entities imposing vice industry restrictions cannot meet strict scrutiny because they do not have a compelling interest to protect. They cannot claim to be protecting college students from vice industries because *in loco parentis* does not apply.[10] Additionally, courts have not found a compelling state interest in protecting the government's reputation.

Even if the government had a compelling interest, the interest is not narrowly tailored because it is underinclusive.[11] If colleges did not want to encourage vice industries, they would restrict all students from promoting them, not just student athletes.[12] Additionally, if colleges wanted to avoid the embarrassment of a connection with vice industries, they would not seek

principal case for the Secondary Effects Doctrine. This limited doctrine gives the government some ways to restrict speech when it seeks to regulate the secondary effects of speech, not the speech itself. This doctrine is mostly used to prohibit sexual displays. *See id.*; City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 442–43 (2002) (restricting adult entertainment stores based on their harmful secondary effects); City of Erie v. Pap's A.M., 529 U.S. 277, 298–302 (2000) (restricting nude dancing based on its harmful secondary effects). The secondary effects doctrine is limited because its reasoning is inconsistent with other First Amendment cases. For example, the government cannot restrict offensive speech because it wants to limit the secondary effects of hearing offensive terms. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); *Turner Broad. Sys.*, 520 U.S. at 189. If the Secondary Effects Doctrine extends beyond sexual displays, it runs the risk of swallowing the First Amendment.

[7] *See, e.g.*, *Ward*, 491 U.S. at 791 (1989) ("[t]he principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys); *Turner Broad. Sys.*, 512 U.S. at 642; *R.A.V.*, 505 U.S. at 386 ("The government may not regulate [speech or expression] based on hostility – or favoritism – towards the underlying message expressed").

[8] *See* Reed v. Town of Gilbert, 576 U.S. 155, 169 (2015). For example, under most vice industry restrictions, a student athlete is free to use their NIL to endorse a video game, but once the content of that video game includes a way for players to gamble real money, the endorsement becomes unlawful.

[9] *Id.* at 171.

[10] *See infra* Part III(B)(2).

[11] *See Reed*, 576 U.S. at 171–72 (reasoning that a content based ordinance restricting certain signs for safety concerns was underinclusive because signs are not more or less safe due to their content).

[12] *See id.*

their own partnerships with the same industries.[13] Thus, vice industry restrictions are unconstitutional content based restrictions.

b. Commercial Speech

If the government restricts commercial speech based on its content, it is subject to a slightly more intermediate standard of review.[14] Importantly, speech does not lose its First Amendment protections just because money was paid in exchange for that speech.[15] Thus, paid advertisements receive First Amendment protections.[16] Typically, the only allowable restrictions on commercial speech are bans on advertisements that a business knows to be misleading,[17] or knows to be inciting illegal conduct.[18]

In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, the Supreme Court articulated a test for restrictions on commercial speech.[19] First, courts determine whether the speech is protected by the First Amendment.[20] Next, courts determine whether the asserted government interest is substantial.[21] Finally, if necessary, courts determine whether the restriction directly advances the government interest, and whether it is over restrictive in advancing that interest.[22]

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[13] *See* Laine Higgins, *The Bar Is Now Open at More College Football Stadiums*, THE WALL ST. J. (Sept. 16, 2021, 10:00 AM), https://www.wsj.com/articles/college-football-beer-gambling-cannabis-sponsorships-11631759264.
[14] *See* U.S. v. Edge Broad. Co., 509 U.S. 418, 426 (1993) (stating that commercial speech receives slightly less protection than other constitutionally protected speech); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762, 769–70 (1976) (extending First Amendment protections to commercial speech, and reasoning that consumers can remove misleading advertisements more effectively than the government).
[15] *See Va. State Bd. of Pharmacy*, 425 U.S. at 761.
[16] *See id.*
[17] *See* U.S. v. Philip Morris USA, Inc., 556 F.3d 1095, 1125–26 (D.C. Cir. 2009) (reasoning that a cigarette manufacturer misleads the public by labeling certain cigarettes "light cigarettes").
[18] Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Rels., 413 U.S. 376, 388 (1973) (reasoning that the government can ban advertisements that facilitate illegal employment discrimination).
[19] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980).
[20] *Id.* (stating that commercial speech is protected by the First Amendment when it concerns lawful activity and is not misleading).
[21] *Id.*
[22] *Id.*

Central Hudson does not provide adequate justification for vice industry restrictions. First, the First Amendment protects commercial speech.[23] Second, the government has no substantial interest in preventing this speech: student athletes are legal adults who are allowed to endorse a product that is legal for them to access in certain contexts.[24] Third, even if there was a substantial interest in preventing student athletes from endorsing vice industries, vice industry restrictions are over restrictive because they are not narrowly tailored.[25] Student athletes are still free to endorse other harmful products, such as fast food. Additionally, vice industry restrictions do not advance any government interest because they apply only to student athletes; others on campus are free to endorse vice industries. Thus, *Central Hudson* does not allow the imposition of vice industry restrictions.[26]

In the past, courts understood that advertisements for vice industries were outside of the protections afforded to commercial speech.[27] However, this exception for restrictions on vice industries has been eliminated.[28] Currently, courts do not allow the government to prohibit advertisements for activities that are lawful in certain contexts.[29] Accordingly, the legality of

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[23] *See id.*
[24] *See generally* Lorillard Tobacco Co. v. Reilly, 553 U.S. 525 (2001) (holding that the government interest in restricting vice industry advertisements becomes substantial if cigarettes are being marketed to children).
[25] *See Central Hudson*, 447 U.S. at 565.
[26] *See id.*
[27] *See* Posadas de P.R. Assoc. v. Tourism Co. of P.R., 478 U.S. 328, 341–43 (1986) (using the *Central Hudson* test to hold that Puerto Rico could restrict advertisements for casino gambling because reducing demand for casino gambling to promote the health, safety, and welfare of its citizens was a substantial government interest); U.S. v. Edge Broad. Co., 509 U.S. 418, 426 (1993) (using the *Central Hudson* test to uphold federal laws restricting advertisements for lotteries in non-lottery states because the underlying industry – gambling – was a vice industry).
[28] *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 514 (1996) (stating that restrictions on advertisements for vice industries do not get a more lenient standard than the one in *Central Hudson*); Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173, 195–96 (1999) (stating that restrictions on advertisements for gambling are subject to a standard *Central Hudson* analysis); *Lorillard Tobacco Co.*, 533 U.S. at 566 (stating that restrictions on advertisements for tobacco are subject to a standard *Central Hudson* analysis). *But see* Coyote Pub., Inc. v. Miller, 598 F.3d 592, 604–06 (9th Cir. 2010) (reasoning that advertisements for prostitution should be treated differently than advertisements for other vice industries because the "vice" at issue is not sex but the sale of sex, and because prostitution is prohibited by every state except Nevada).
[29] *See 44 Liquormart, Inc*., 517 U.S. at 514 (stating that a vice label without a prohibition against the commercial behavior at issue does not provide a justification for the regulation of commercial speech surrounding that behavior). The Court is concerned that the vice exception could swallow the First Amendment because allowing any activity

vice industries, such as alcohol, tobacco, marijuana, and gambling, in certain contexts, excludes them from any vice industry exception that might remain in the commercial speech doctrine.[30]

It may be argued that vice industry restrictions should not be assessed as restrictions on commercial speech, but rather as a college protecting its students from vice industries. However, this reasoning is incorrect. Schools may only restrict off-campus speech if the speech has a strong nexus to the school's duty to protect the student body.[31] Restrictions on off-campus speech – such as NIL policies – still must comply with *Tinker*.[32] In *Morse v. Frederick*, the Supreme Court held that *Tinker* allowed a school to restrict off-campus speech that promoted drug use.[33] While K-12 schools have a compelling interest in preventing student speech that glamorizes drug use at an off-campus event, colleges and universities do not.[34] The Court in *Morse* is influenced by *in loco parentis*,[35] a common law doctrine where parents delegate some

that could threaten public health or morals to be labeled as a vice activity could be a pretext for censorship. Further, the Court reasons that products such as alcoholic beverages, lottery tickets, and playing cards do not fall under the vice exception because they can be lawfully purchased on the open market. *See id.*

[30] *See id.*

[31] Kowalski v. Berkeley Cnty. Schs., 652 F.3d 565, 577 (4th Cir. 2011) (reasoning that a student creating a webpage to make fun of another student had a sufficient nexus with the school); Battacharya v. Murray, 515 F. Supp. 3d 436, 454 (W.D. Va. 2021) (applying the *Kowalski* test to a public university).

[32] *See* Morse v. Frederick, 551 U.S. 393 (2007); Tinker v. Des. Moines Indep. Sch. Dist., 393 U.S. 503, 514 (stating that K-12 schools can restrict speech that causes a substantial disruption or materially interferes with school activities); Healy v. James, 408 U.S. 169, 189 (1972) (applying *Tinker* to public colleges). NIL endorsement deals are off-campus speech because they occur away from educational settings, during the student athlete's free time. *See* B.L. v. Mahoney Area Sch. Dist. 964 F.3d 170, 189 (3d Cir. 2020) (stating that off-campus speech is, "speech that is outside school-owned, -operated, or -supervised channels and that is not reasonably interpreted as bearing the school's imprimatur.").

[33] *Morse*, 551 U.S. at 408 (reasoning that *Tinker* allowed a student suspension because of the risks of high school students engaging in drug use; the emphasis that Congress had placed on drug-prevention programs in the K-12 setting; and the emphasis placed by thousands of school boards on educational programs to prevent drug use).

[34] *See* Dixon v. Ala. State Bd. of Ed., 294 F.2d 150, 158 (5th Cir. 1961).

[35] *Id.* at 407–08.

parental authority to the school system.[36] *In loco parentis* no longer extends to institutions of higher education.[37]

Additionally, the Court is generally skeptical of off-campus restrictions on speech.[38] While *Tinker* allows schools to restrict speech to prevent a substantial disruption,[39] the Court in *Mahoney* stated that this interest diminishes in off-campus speech.[40] A school's regulatory interests in restricting off-campus speech are implicated by bullying, threats, work on academic assignments, use of computers, participation in online activities, and breaches of security.[41] None of these interests are present with NIL policies.[42] Additionally, courts will be skeptical of off-campus speech restrictions because – when coupled with a similar on-campus restriction – they represent a 24/7 restriction on that speech, which leaves no reasonable alternatives.[43] A reasonable alternative is a key feature of a permissible restriction on speech.[44]

Furthermore, a court would surely look to the fact that many schools are promoting vice industries for their own financial benefits while restricting their student athletes from doing the

[36] *See* 1 W. Blackstone, Commentaries on the Laws of England 441 (1765) (("[A parent] may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986) (stating that First Amendment rights of students in schools do not extend as far as First Amendment rights enjoyed by adults in other settings); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) (stating that First Amendment rights of students must be "applied in light of the special characteristics of the school environment") (citing *Tinker*, 393 U.S. at 506).
[37] *See Dixon*, 294 F.2d at 158 (reasoning that expulsion from a public university must be governed by the Constitution and not any other justification, such as *in loco parentis*); *See generally* Martha Craig Daughtrey, *Women and the Constitution: Where We Are at the End of the Century*, 75 N.Y.U. L. REV. 1, 15 (2000) (explaining a challenge to a university curfew for female students that was implemented in the name of student safety, an *in loco parentis* justification. Such curfews have been eliminated in today's universities).
[38] *See* Mahoney Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2045 (2021).
[39] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).
[40] *Mahoney*, 141 S. Ct. at 2045. This is a recently decided case involving a high school student who successfully challenged her suspension on the grounds that the First Amendment allowed her to use profanity to criticize her school's cheerleading team on social media. While it has not been extended to higher education, the principles that *Mahoney* stands for are applicable to off-campus speech made by student athletes.
[41] *Id.*
[42] *See Tinker*, 393 U.S. at 513; *Mahoney*, 141 S. Ct. at 2045.
[43] *Mahoney*, 141 S. Ct. at 2046.
[44] *See, e.g.*, City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 53–54 (1986).

same.[45] Accordingly, a college or university cannot justify a vice industry restriction because of an asserted interest in protecting students from vice industries. The *in loco parentis* justification that influenced the Court in *Morse* is not present because vice industry restrictions target college athletes, not high school students.[46]

3. Institutional Values NIL Restrictions Are Unconstitutionally Vague.

The First Amendment prevents restrictions on speech that are unconstitutionally vague.[47] This void for vagueness doctrine is based upon due process principles:[48] the law must be sufficiently clear so that people can knowingly comply with the law.[49] Clarity also prevents arbitrary enforcement.[50] If a reasonable person cannot understand what is prohibited under a law, the government can enforce it arbitrarily.[51] The fear of arbitrary enforcement will chill speech,

[45] Higgins, *supra* note 13 (stating that universities are partnering with vice industries, such as alcohol, cannabis, and gambling, to recoup financial losses suffered during the pandemic); Nadir Pearson, *120 of the Best College Courses, Degrees, and Certifications for Cannabis*, LEAFLY (July 13, 2022), https://www.leafly.com/news/industry/best-cannabis-college-degrees-and-certifications (explaining which colleges offer the best education in cannabis sale and production); Press Release, Office of Gov. Hochul, Gov. Hochul Announces $5 Million in Funding to Support the Launch of New and Existing Cannabis Accreditation Programs (July 18, 2022) (announcing a grant for State University of New York (SUNY) schools to create cannabis education programs). Note that despite SUNY's support for cannabis education, student athletes at UB, a SUNY school, are prohibited from endorsing cannabis products. *See* UNIVERSITY AT BUFFALO, NAME IMAGE AND LIKENESS PILLARS, https://ubbulls.com/documents/2021/6/30/UB_NIL_Pillars_2023.pdf.

[46] *See* Morse v. Frederick, 551 U.S. 393, 408 (2007).

[47] *See generally* Coates v. Cincinnati, 402 U.S. 611 (1971); Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981).

[48] *See, e.g.*, *Coates*, 402 U.S. at 614–15; United States v. Williams, 553 U.S. 285, 304 (2008).

[49] *See Coates*, 402 U.S. at 614–15. *But see* Broadrick v. Oklahoma, 413 U.S. 601, 607–08 (1972) (reasoning that a state law that prohibited state employees from belonging to a political club, running for office, or managing a political party was not unconstitutionally vague because while there was some uncertainty, it was still clear what activity was prohibited); Grayned v. City of Rockford, 408 U.S. 104, 110 (1972) (holding that a noise ordinance, which prohibited "any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class" was not unconstitutionally vague because it was clear what the ordinance prohibited).

[50] *See id.* at 108; Cohen v. California, 403 U.S. 15, 19 (1971).

[51] *See* DA Mortg., Inc. v. City of Miami Beach, 486 F.3d 1254, 1270–72 (11th Cir. 2007). *See generally Coates*, 402 U.S.; Reed v. Town of Gilbert, 576 U.S. 155 (2015).

and society will be made worse off by cheapening the marketplace of ideas.[52] Furthermore, speech restrictions are unconstitutionally overbroad if they restrict protected speech.[53]

A restriction is unconstitutionally vague if reasonable people are left to guess at what speech is prohibited.[54] In *Coates v. City of Cincinnati*, the Supreme Court held that an ordinance prohibiting people from annoying passersby on the sidewalk was unconstitutionally vague because reasonable people would be left to guess at what speech is annoying.[55] There is no way of knowing what a particular officer enforcing the ordinance will find annoying, allowing for arbitrary enforcement and a chilling of speech.[56] Additionally, the Court found the Cincinnati ordinance to be overbroad because it would authorize the punishment of constitutionally protected conduct.[57]

Vague speech restrictions in campus speech codes were challenged in the 1990's and 2000's.[58] Speech codes were struck down when reasonable students were left to guess what speech was prohibited, and when the codes restricted more speech than was necessary to prevent

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[52] *See* Schad v. Borough of Mount Ephraim, 452 U.S. 61, 68 (1981) (holding that a ban on all live entertainment in a borough was overbroad because it would deter protected activities); Reno v. ACLU, 521 U.S. 844, 877 (1997) (reasoning that prohibitions on the distribution of material that is "patently offensive" or "indecent" were unconstitutionally vague because they would restrict nonpornographic materials that could have beneficial social value).
[53] *See Schad*, 452 U.S. at 68.
[54] *Coates*, 402 U.S. at 614.
[55] *Id.* at 611–14.
[56] *See id.* (reasoning that what will annoy some people will not annoy others).
[57] *Id.* (reasoning that an arresting officer enforcing this ordinance could prevent an otherwise lawfully conducted protest because he or she found it annoying).
[58] *See generally* Azhar Majeed, *Defying the Constitution: The Rise, Persistence, and Prevalence of Campus Speech Codes*, 7 GEO. J.L. & PUB. POL'Y 481, 488–94 (2009) (explaining how almost all speech codes have been struct down as unconstitutionally vague); James R. Bussian, *Anatomy of the Campus Speech Code: An Examination of Prevailing Regulations*, 36 S. TEX. L. REV. 153, 171–73 (1995) (surveying relevant litigation over speech codes); Thomas A. Schweitzer, *Hate Speech on Campus and the First Amendment: Can They Be Reconciled?*, 27 CONN. L. REV. 493 (1995) (discussing arguments for and against campus speech codes from professors and administrators); *What Are Speech Codes*, FOUND. FOR INDIVIDUAL RIGHTS AND EXPRESSION, https://www.thefire.org/research-learn/what-are-speech-codes#:~:text=Reforming%20College%20Policies,Amendment%20in%20society%20at%20large (stating that a speech code is any "university regulation or policy that prohibits expression that would be protected by the First Amendment in society at large", and stating that speech codes typically banned broad topics such as "offensive content" and "disparaging remarks").

a substantial disruption.[59] Alternatively, speech codes were upheld when they used established and defined legal terms to describe banned categories of speech.[60] Furthermore, speech codes were upheld when they provided an aspirational goal to discourage offensive speech without banning it.[61]

Many institutional values restrictions are unconstitutionally vague.[62] For example, the proposed College Athlete Compensatory Rights Act prohibits student athletes from using their NIL to promote any "product or service that is reasonably considered to be inconsistent with the values of an institution."[63] This language likely incorporates the stated institutional values of the student athlete's college.[64] Some common institutional values such as discovery, diversity,

[59] Doe v. Univ. of Mich., 721 F. Supp. 852, 867 (E.D. Mich. 1989) (holding that a ban on language the stigmatized an individual was unconstitutionally overbroad because there was no conceptual distinction between what stigmatized an individual and what did not); Coll. Republicans at S.F. Univ. v. Reed, 523 F. Supp. 2d 1005, 1024 (N.D. Cal. 2007) (reasoning that a ban on speech that is not "civil" is unconstitutionally vague because, without a definition of civil, a reasonable student would be left to guess what civil means).

[60] Corlett v. Oakland Univ. Bd. of Tr., 958 F. Supp. 2d 795, 810 (E.D. Mich. 2013) (holding that a prohibition on speech that intimidated, harassed, or threatened was not unconstitutionally vague because these terms have established legal definitions that allowed students to conform their conduct to the policy); *Reed*, 523 F. Supp. 2d at 1021–22 (reasoning that while terms such as "intimidation" and "harassment" could include protected speech, they are not unconstitutionally vague because they appear in the context of preventing "[c]onduct that threatens or endangers the health or safety of any person").

[61] Bair v. Shippensburg Univ., 280 F. Supp. 2d 357, 371 (M.D. Pa. 2003) (holding that the non-aspirational components of the speech code were unconstitutionally overbroad because they banned speech that was protected by the First Amendment). An aspirational speech code is a good way for a school to reflect its own institutional values without directly interfering with the First Amendment rights of its students. Unfortunately, NIL restrictions are not aspirational.

[62] *Infra* Appendices I, II, and III.

[63] *Id.*; Collegiate Athlete Compensation Rights Act, S. 4855, 117th Cong. (2022).

[64] A brief survey of value statements of select universities shows the following: Penn State lists, and very briefly defines, institutional values of integrity, respect, responsibility, discovery, excellence, and community. *The University's Mission*, PENN STATE OFFICE OF THE EXEC. VICE PRESIDENT AND PROVOST, https://provost.psu.edu/mission-vision/. Baylor University lists values such as, "Promot[ing] the health of mind, body, and spirit as these are understood in the Christian tradition and by the best of modern physical and psychological science". *Core Convictions*, BAYLOR UNIV., https://about.web.baylor.edu/values-vision/core-convictions. University of Washington lists the following values without providing any definitions: integrity, diversity, excellence, collaboration, innovation, and respect. *Vision & Values*, UNIV. OF WASH., https://www.washington.edu/about/visionvalues/. Howard University lists the following values without providing any definitions: excellence, leadership, service, and truth. *Mission, Vision & Values*, HOWARD UNIV., https://strategicplan.howard.edu/about/mission-vision-values#:~:text=Excellence%2C%20leadership%2C%20service%2C%20and,issues%20impacting%20the%20African%20Diaspora.

excellence, collaboration, and service would render this statute unconstitutionally vague.[65] These terms are similar to other guidelines found to be unconstitutionally vague – such as "annoying" and "civil" – because a reasonable student athlete would be left to guess whether a product or service is inconsistent with these values.[66] Accordingly, protected speech – the ability to enter into NIL deals – would be chilled out of fear of losing athletic eligibility.[67] A briefly defined values statement does not give sufficient notice because it does not use terms with legally established definitions, or references to a narrowly defined policy goal.[68]

One value stated by Baylor University is an example of a non-vague restriction: "Promot[ing] the health of mind, body, and spirit as these are understood in the Christian tradition and by the best of modern physical and psychological science".[69] For example, if a student athlete at Baylor used their NIL to promote an online sports gambling service, there is sufficient context to know that this deal would be inconsistent with Baylor's values.[70] The Christian tradition is opposed to gambling;[71] there are harmful, addictive effects of gambling that

[65] *See* Doe v. Univ. of Mich., 721 F. Supp. 852, 867 (E.D. Mich. 1989); Coll. Republicans at S.F. Univ. v. Reed, 523 F. Supp. 2d 1005, 1024 (N.D. Cal. 2007); Coates v. Cincinnati, 402 U.S. 611, 614–15 (1971).
[66] *See Reed*, 523 F. Supp. 2d at 1024; *Coates*, 402 U.S. at 614–15. A good example would be excellence, which is listed as a value by all four universities that I randomly selected for this exercise. Excellence means different things to different people. Consider this: a student athlete from an impoverished background enters into a lucrative NIL deal with a local financial institution that issues legal, but arguably predatory, payday loans. Reasonable observers could claim that this NIL deal supports excellence because a student athlete, who grew up poor, is now able to use their athletic ability to help their family and achieve upward social mobility. Other reasonable observers could say that the deal with the financial institution does not support excellence because it makes the community worse off by enabling predatory practices. Neither interpretation is necessarily correct; it depends on your definition of excellence. The student athlete would be left to guess at the meaning of excellence as applied to this potential NIL deal.
[67] *See Reed*, 523 F. Supp. 2d at 1024 (stating that vague speech restrictions chill protected speech).
[68] *See* Corlett v. Oakland Univ. Bd. of Tr., 958 F. Supp. 2d 795, 810 (E.D. Mich. 2013); Coll. Republicans at S.F. Univ. v. Reed, 523 F. Supp. 2d 1005, 1021–22 (N.D. Cal. 2007).
[69] *Core Convictions*, *supra* note 64.
[70] *See Reed*, 523 F. Supp. 2d at 1021–22.
[71] *See* 1 *Timothy* 6:9–10 ("Those who want to get rich fall into temptation and a trap and into many foolish and harmful desires that plunge people into ruin and destruction. For the love of money is a root of all kinds of evil. Some people, eager for money, have wandered from the faith and pierced themselves with many griefs.").

have been recognized by modern psychological science.[72] A Baylor student athlete would not be left to guess what action would be inconsistent with Baylor's values.[73] In order for the Collegiate Athlete and Compensatory Rights Act to survive a vagueness challenge, colleges would have to adopt more comprehensive values statements, such as Baylor's, allowing reasonable student athletes to understand how to comply.[74]

Furthermore, New York's NIL policy is unconstitutionally vague. New York prevents student athletes from entering into an endorsement deal that "would reasonably be judged to cause financial loss or reputational damage to the college[.]"[75] A student athlete would be left to guess about potential financial loss because marketing is an inexact science.[76] Furthermore, it is difficult to reasonably judge what the reputational damage of an NIL deal would be without further guidance.[77]

The University at Buffalo (UB) NIL policy is also unconstitutionally vague. UB prevents student athletes from using their NIL in any way that is "deemed otherwise damaging to the University's reputation, to be reviewed by university officials."[78] This policy has a similar

[72] *Compulsive Gambling*, MAYO CLINIC, https://www.mayoclinic.org/diseases-conditions/compulsive-gambling/symptoms-causes/syc-20355178.
[73] *See Coates*, 402 U.S. at 614–15.
[74] *See* Corlett v. Oakland Univ. Bd. of Tr., 958 F. Supp. 2d 795, 810 (E.D. Mich. 2013); Coll. Republicans at S.F. Univ. v. Reed, 523 F. Supp. 2d 1005, 1021–22 (N.D. Cal. 2007).
[75] N.Y. EDUC. § 6438-a (McKinney 2023).
[76] *See Coates*, 402 U.S. at 614–15. Note that the reasonableness requirement means that an endorsement deal with a product or service that is facially offensive or ridiculous would not be covered. A reasonable student athlete would know what obviously causes financial harm. The difficulty comes with more realistic endorsement deals where a student athlete would not have the necessary information to comply with the requirement.
[77] *See id.* The reputation of a college could mean many different things. For example, an NIL deal with a company that markets drinking games could harm the college's academic reputation but enhance the college's social reputation. Conversely, an NIL deal with a company that manufactures graphing calculators could enhance the college's academic reputation while harming the college's social reputation. The student athlete would have to guess what reputational damage means to the state of New York, and subject themselves to arbitrary enforcement because the term "reputational damage" can have different meanings.
[78] UNIVERSITY AT BUFFALO, NAME IMAGE AND LIKENESS PILLARS, https://ubbulls.com/documents/2021/6/30/UB_NIL_Pillars_2023.pdf.

problem with "reputation", a term with insufficient context to withstand a vagueness challenge.[79] Additionally, by imposing a preclearance requirement, a student athlete would be left to guess what an unnamed university official understands to be reputation damaging.[80] This is a prior restraint, which is presumptively unconstitutional due the substantial risk of chilling protected speech.[81]

To varying degrees, NIL institutional values restrictions are unconstitutionally vague because reasonable student athletes are left to guess at what speech is restricted. The confusion will chill student athletes from participating in protected speech. The impact of NIL policies on campus political speech could be drastic.

[79] *See* Coll. Republicans at S.F. Univ. v. Reed, 523 F. Supp. 2d 1005, 1024 (N.D. Cal. 2007); *Coates*, 402 U.S. at 614–15.
[80] *See generally* Near v. Minnesota, 283 U.S. 697 (1931); N.Y. Times v. United States, 403 U.S. 713 (1971); Neb. Press Assoc. v. Stuart, 427 U.S. 539 (1976).
[81] *See* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."); *Stuart*, 427 U.S. at 559 ("[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."); Bowman v. White, 444 F.3d 967, 980 (6th Cir. 2006) (stating that a university's requirement that a non-university group obtain a permit from a university official before using an outdoor space is a prior restraint that bears a heavy presumption of unconstitutionality).

Applicant Details

First Name	**Tallulah**
Last Name	**Wick**
Citizenship Status	**U. S. Citizen**
Email Address	**tallulah@umich.edu**
Address	**Address** Street **950 Greene Street, Unit 321** City **Ann Arbor** State/Territory **Michigan** Zip **48104** Country **United States**
Contact Phone Number	**3475746992**

Applicant Education

BA/BS From	**Northwestern University**
Date of BA/BS	**June 2019**
JD/LLB From	**The University of Michigan Law School** **http://www.law.umich.edu/currentstudents/careerservices**
Date of JD/LLB	**May 3, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**The Michigan Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Kornblatt, Kerry
kkorn@umich.edu
Wilensky, Beth
wilensky@umich.edu
734-615-5285
Prescott, James
jjpresco@umich.edu
734-763-2326

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Tallulah Wick
950 Greene Street, Apt 321, Ann Arbor, MI 48104
(347) 574.6992 • tallulah@umich.edu

June 12, 2023

The Honorable Juan R. Sánchez
U.S. District Court for the Eastern District of Pennsylvania
James A. Byrne U.S. Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Chief Judge Sánchez,

I am a rising third-year student at the University of Michigan Law School and am writing to apply for a clerkship in your chambers for the 2024–2025 term.

Prior to law school, I was a paralegal at the Manhattan District Attorney's Office in the Major Economic Crimes Bureau, where I learned how to work as a member of a team in a fast-paced environment. I supported attorneys on high-pressure, short-term cases as well as complex, long-term litigation, answering to anyone whenever they needed help with a legal, administrative, or logistical task. This experience provided me with skills that I have continued to hone in law school and in legal internships. This past summer, I put my legal research and writing skills to use in a practical setting as an intern in Judge Vyskocil's chambers in the Southern District of New York. While there, I drafted memoranda as well as a preliminary opinion on a motion to dismiss. Through my close work with Judge Vyskocil and her clerks, I learned the importance of not only writing and revising my own work but also editing other people's writing to enhance my own legal understanding and writing skills. In my second year at Michigan Law, I sought out opportunities to further my legal aptitudes. I chose to be a research assistant to Professor Prescott, writing briefs and revising his articles for academic journals. As a teaching assistant for Professor Wilensky, I worked with brand-new legal writers, teaching them the fundamentals and helping them refine their writing. I was also selected to serve as an Executive Editor of the *Michigan Law Review*. While these roles further developed my research, writing, and editing abilities, I take the most pride in my ability to connect with people. If I am fortunate enough to be selected as your law clerk, I will bring enthusiasm and humor to your chambers, allowing me to immediately contribute as a member of your team.

My resume, writing sample, law school transcript, and letters of recommendation from the below individuals are attached for your review.

- Professor J.J. Prescott: jjpresco@umich.edu, 734-751-2421
- Professor Beth Wilensky: wilensky@umich.edu, 734-615-5285
- Professor Kerry Kornblatt: kkorn@umich.edu, 734-647-8595

Thank you very much for your time and consideration.

Respectfully,

Tallulah Wick

Tallulah Wick
950 Greene Street, Apt 321, Ann Arbor, MI 48104
(347) 574.6992 • tallulah@umich.edu

EDUCATION

University of Michigan Law School — Ann Arbor, MI
Juris Doctor — Expected May 2024
Journal: Executive Editor, *Michigan Law Review*
Honors: Dean's Scholarship
Activities: Senior Judge (legal writing and research teaching assistant) for Professor Beth Wilensky
Co-President, Wolverine Street Law
Leader, Freshman Year Information Program

Northwestern University — Evanston, IL
Bachelor of Science, *cum laude*, in Social Policy and African American Studies — June 2019
Activities: Event Chair, Standards Representative, Nominating Committee Chair, Kappa Kappa Gamma
Member, Phi Alpha Delta Law Fraternity

PROFESSIONAL EXPERIENCE

Kirkland & Ellis LLP — New York, NY
Summer Associate — May 2023 – July 2023

University of Michigan Law School — Ann Arbor, MI
Research Assistant, Professor J.J. Prescott — August 2022 – May 2023

- Edited two articles in preparation for publication in academic journals
- Revised and investigated sources and citations for a report for Washtenaw County Prosecutor's Office
- Performed legal research and wrote memoranda on collateral consequences and plea bargaining

U.S. District Court for the Southern District of New York — New York, NY
Judicial Intern, Honorable Mary Kay Vyskocil — May 2022 – July 2022

- Researched and analyzed 1983 claims and habeas corpus petitions
- Drafted preliminary court opinions and findings of fact, including reports and recommendations

Manhattan District Attorney's Office — New York, NY
Paralegal, Major Economic Crimes Bureau — August 2019 – July 2021

- Cataloged and managed compliance from entities to maintain the integrity of the records and provide organization for attorneys' cases
- Collaborated with forensic accounting and financial investigators to analyze records to establish the basis of financial investigations
- Analyzed filings to determine whether an investigation should be opened into suspicious activity, including in-depth open-source research on potential targets; presented findings to a team weekly
- Managed the production of discovery for documents and non-document types, including redacting, Bates stamping, and watermarking for the defense
- Drafted official documents such as subpoenas and letters of preservation for attorneys
- Testified to the accuracy and integrity of evidence during grand jury proceedings

Cook County State's Attorney's Office — Skokie, IL
Legal Intern — January 2019 – March 2019

- Assisted prosecutors in daily courtroom proceedings by making photocopies of records and organizing case records, creating efficiency for the prosecutors and judge
- Managed the organization and copying of discovery for the defense

INTERESTS

- Japanese stationery collector, documentary enthusiast, and backgammon aficionado

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The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Wick,Tallulah Dillingham
Student#: 74492519

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2021	**(August 30, 2021 To December 17, 2021)**							
LAW	510	002	Civil Procedure	Richard Friedman	4.00	4.00	4.00	B+
LAW	530	001	Criminal Law	JJ Prescott	4.00	4.00	4.00	A-
LAW	580	002	Torts	Sherman Clark	4.00	4.00	4.00	A-
LAW	593	005	Legal Practice Skills I	Beth Wilensky	2.00		2.00	S
LAW	598	005	Legal Pract:Writing & Analysis	Beth Wilensky	1.00		1.00	S
Term Total				**GPA: 3.566**	**15.00**	**12.00**	**15.00**	
Cumulative Total				**GPA: 3.566**		**12.00**	**15.00**	
Winter 2022	**(January 12, 2022 To May 05, 2022)**							
LAW	520	001	Contracts	Andrew Jordan	4.00	4.00	4.00	B+
LAW	540	001	Introduction to Constitutional Law	Leah Litman	4.00	4.00	4.00	B+
LAW	594	005	Legal Practice Skills II	Beth Wilensky	2.00		2.00	S
LAW	660	001	Boundaries of Citizenship	Rebecca Scott	3.00	3.00	3.00	B+
Term Total				**GPA: 3.300**	**13.00**	**11.00**	**13.00**	
Cumulative Total				**GPA: 3.439**		**23.00**	**28.00**	

Continued next page >

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The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Wick,Tallulah Dillingham
Student#: 74492519

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2022	**(August 29, 2022 To December 16, 2022)**							
LAW	483	001	Judicial Clerkships	Kerry Kornblatt	2.00	2.00	2.00	A
LAW	641	001	Crim Just: Invest&Police Prac	Eve Primus	4.00	4.00	4.00	A
LAW	771	001	Progres Prosecution: Law&Pol'y	Eli Savit	2.00	2.00	2.00	A
LAW	781	001	FDA Law	Victoria Burton-Harris Ralph Hall	3.00		3.00	P
LAW	799	001	Senior Judge Seminar	Ted Becker	2.00		2.00	S
LAW	900	393	Research	Patrick Barry	1.00		1.00	S
LAW	900	259	Research	JJ Prescott	1.00	1.00	1.00	A
Term Total				**GPA: 4.000**	**15.00**	**9.00**	**15.00**	
Cumulative Total				**GPA: 3.596**		**32.00**	**43.00**	
Winter 2023	**(January 11, 2023 To May 04, 2023)**							
LAW	560	001	Property	Emily Prifogle	4.00	4.00	4.00	A
LAW	643	001	Crim Procedure: Bail to Post Conviction Review	Barbara Mcquade	3.00	3.00	3.00	A-
LAW	799	001	Senior Judge Seminar	Ted Becker	2.00		2.00	S
LAW	807	001	Civil Rights Litigation	Nakisha Chaney	3.00	3.00	3.00	A
LAW	848	001	Cities & States as Plaintiffs	Eli Savit	2.00	2.00	2.00	A
LAW	900	259	Research	JJ Prescott	1.00	1.00	1.00	A
Term Total				**GPA: 3.930**	**15.00**	**13.00**	**15.00**	
Cumulative Total				**GPA: 3.693**		**45.00**	**58.00**	

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The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Wick,Tallulah Dillingham
Student#: 74492519

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2023	**(August 28, 2023 To December 15, 2023)**							
Elections as of:	05/30/2023							
LAW	677	001	Federal Courts	Gil Seinfeld	4.00			
LAW	797	001	Model Rules and Beyond	Bob Hirshon	3.00			
LAW	810	001	Corp Social Resp: Reg&Crim App	Chavi Nana	2.00			
LAW	972	001	Federal Appel Litig Clnc I	Melissa Salinas	5.00			

End of Transcript
Total Number of Pages 3

University of Michigan Law School Grading System

Honor Points or Definitions

Through Winter Term 1993		Beginning Summer Term 1993	
A+	4.5	A+	4.3
A	4.0	A	4.0
B+	3.5	A-	3.7
B	3.0	B+	3.3
C+	2.5	B	3.0
C	2.0	B-	2.7
D+	1.5	C+	2.3
D	1.0	C	2.0
E	0	C-	1.7
		D+	1.3
		D	1.0
		E	0

Other Grades:

F Fail.

H Top 15% of students in the Legal Practice courses for students who matriculated from Spring/Summer 1996 through Fall 2003. Top 20% of students in the Legal Practice courses for students who matriculated in Spring/Summer 2004 and thereafter. For students who matriculated from Spring/Summer 2005 through Fall 2015, "H" is not an option for LAW 592 Legal Practice Skills.

I Incomplete.

P Pass when student has elected the limited grade option.*

PS Pass.

S Pass when course is required to be graded on a limited grade basis or, beginning Summer 1993, when a student chooses to take a non-law course on a limited grade basis.* For SJD students who matriculated in Fall 2016 and thereafter, "S" represents satisfactory progress in the SJD program. (Grades not assigned for LAW 970 SJD Research prior to Fall 2016.)

T Mandatory pass when student is transferring to U of M Law School.

W Withdrew from course.

Y Final grade has not been assigned.

* A student who earns a grade equivalent to C or better is given a P or S, except that in clinical courses beginning in the Fall Term 1993 a student must earn a grade equivalent to a C+ or better to be given the S.

MACL Program: HP (High Pass), PS (Pass), LP (Low Pass), F (Fail)

Non-Law Courses: Grades for these courses are not factored into the grade point average of law students. Most programs have customary grades such as A, A-, B+, etc. The School of Business Administration, however, uses the following guides: EX (Excellent), GD (Good), PS (Pass), LP (Low Pass) and F (Fail).

Third Party Recipients

As a third party recipient of this transcript, you, your agents or employees are obligated by the Family Rights and Privacy Act of 1974 not to release this information to any other third party without the written consent of the student named on this Cumulative Grade Report and Academic Record.

Official Copies

An official copy of a student's University of Michigan Law School Cumulative Grade Report and Academic Record is printed on a special security paper with a blue background and the seal of the University of Michigan. A raised seal is not required. A black and white is not an original. Any alteration or modification of this record or any copy thereof may constitute a felony and/or lead to student disciplinary sanctions.

The work reported on the reverse side of this transcript reflects work undertaken for credit as a University of Michigan law student. If the student attended other schools or colleges at the University of Michigan, a separate transcript may be requested from the University of Michigan, Office of the Registrar, Ann Arbor, Michigan 48109-1382.

Any questions concerning this transcript should be addressed to:

Office of Student Records
University of Michigan Law School
625 South State Street
Ann Arbor, Michigan 48109-1215
(734) 763-6499

UNIVERSITY OF MICHIGAN LAW
Legal Practice Program
801 Monroe Street, 945 Legal Research
Ann Arbor, Michigan 48109-1210

Kerry Kornblatt
Clinical Assistant Professor of Law

June 11, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write in support of Tallulah Wick's clerkship application. Tallulah was a student in my Judicial Clerkships class, and I'm familiar with her excellent work. I am pleased to recommend her.

This past fall, Tallulah took my Judicial Clerkships practice seminar. She did an excellent job and earned an A, tying for the second-highest score in the class. To put Tallulah's performance in context, it's worth noting that Tallulah's fellow students in the clerkship class were not at all a typical cross-section of students at the law school. The class was designed for clerkship-interested students; it attracted a truly talented group, several of whom had already accepted clerkship positions. Earning an A is impressive.

Over the course of the semester, I had the opportunity to work closely with Tallulah and evaluate her legal writing. (The class was only 16 people, and students did multiple writing assignments, including drafts and re-writes of a bench memo and an opinion.) Tallulah did polished, clerk-level work in my class. Her legal writing is thorough and well organized. In particular, Tallulah has a real talent for working through complex legal issues and figuring out the best way to navigate the reader through.

In addition to Tallulah's strong legal writing, there are a couple of reasons I think she would do well as a clerk.

First, she will be well-prepared. Tallulah will enter any clerkship with considerable experience. Through our class, Tallulah has experience drafting both opinions and bench memos. She has also practiced critically evaluating the analysis of another chambers (or staff attorney) and editing the work of a judge or co-clerk. She has worked with the ethics rules that apply to clerks. She has helped interview numerous guest judges on best clerking practices and how to avoid pitfalls.

Second, Tallulah is well-suited for the collaborative, iterative process that judicial chambers tend to employ to draft their work. In our class, Tallulah consistently drafted her assignments well ahead of the deadline, leaving time for her to check in about an organizational choice she'd made or reach out to discuss a judgment call. She is comfortable talking through knotty legal issues in person (and couldn't be more prepared or professional while doing it). She also possesses a real talent for taking feedback and adjusting—not just inputting changes, but constantly evaluating and figuring out what steps are needed to make the opinion the closest to perfect that it can be. Working with Tallulah was like working with a judicial law clerk with just the right approach.

For all of these reasons, I'm confident that Tallulah would make a standout clerk. If I may be of any further assistance, please feel free to contact me.

Sincerely,

/Kerry Kornblatt/

Kerry Kornblatt
Clinical Assistant Professor of Law

UNIVERSITY OF MICHIGAN LAW
Legal Practice Program
801 Monroe Street, 945 Legal Research
Ann Arbor, Michigan 48109-1210

Beth Wilensky
Clinical Professor of Law

June 11, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am thrilled to recommend Tallulah Wick for a judicial clerkship. Tallulah excels as both a student and teaching assistant, and I am confident that she will excel as a judicial clerk as well. Her legal talent and personal characteristics will make her a valuable addition to any judicial chambers.

Tallulah was a student in my Legal Practice class during her 1L year at the University of Michigan Law School. Legal Practice is a required yearlong course in legal analysis, writing, and research. I get to know my students well because I have only about 40 of them, and I meet with them individually multiple times each semester to discuss their work.

Tallulah narrowly missed earning an Honors grade. I attribute her strong performance in Legal Practice to a combination of talent and hard work. On the talent side, Tallulah regularly demonstrated a natural ability to grasp complex legal concepts and communicate about them with ease. Her writing is clear, succinct, and always a pleasure to read. One of Tallulah's biggest strengths is her research skills. In fact, she earned the highest grades in the class on every research assignment that was eligible for numerical grades. Tallulah is creative and dogged in her research. She excels at thinking strategically about the research process, finding what she needs, and using it effectively.

With respect to her work ethic, Tallulah brings a seriousness and focus to everything she does. My individual conferences with Tallulah were characterized by her reflective and well-thought-out questions. And because Legal Practice is graded on a modified pass/fail basis, the rewards for the dedication Tallulah demonstrated are primarily personal, and not reflected in a student's GPA. The students who do the best in the class are those with a strong work ethic and desire to get the most out of every educational opportunity; Tallulah is no exception.

Tallulah's other personal characteristics will also make her a valuable judicial clerk. In particular, she is a supportive and valuable team member. I frequently have my students break into small groups during class to engage in an activity while I circulate, observe, and listen. I also assigned one team project, and encourage collaboration on other assignments. Tallulah clearly earned the respect of her peers with her quiet yet confident style of collaboration. She is approachable, but still firm about her views when appropriate. I expect that those qualities will make her an excellent addition to any judicial chambers.

On the strength of her performance in my class, I hired Tallulah as a teaching assistant (or "Senior Judge" as we call them at Michigan) during her 2L year. In that capacity, Tallulah continued to shine, displaying superior analytical, writing, and research talent, as well as initiative. I expect a lot from my Senior Judges. I assign them significant substantive work, primarily involving researching and writing new problems for my students and vetting other problems that I have written. They must juggle those projects – which typically have long deadlines – with the day-to-day student-facing work of providing feedback on student citation and research logs and holding individual conferences. On every project I have assigned, Tallulah turned in work that was creative and detailed. I have also sought Tallulah's advice about making improvements to my course and addressing student concerns as they arise. In doing so, I have always found her counsel to be thoughtful and her judgment impeccable.

Finally, Tallulah is warm, professional, and a pleasure to know and to teach. I recommend her to you with enthusiasm.

Sincerely,

/Beth Hirschfelder Wilensky/

Beth Hirschfelder Wilensky
Clinical Professor of Law

Beth Wilensky - wilensky@umich.edu - 734-615-5285

UNIVERSITY OF MICHIGAN LAW
701 South State Street
Ann Arbor, MI 48109

JAMES J. PRESCOTT
Professor of Law
Co-Director, Program in Law and Economics
Co-Director, Empirical Legal Studies Center

June 11, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write with enthusiasm to recommend Tallulah (Tally) Wick for a clerkship in your chambers. Tally is a fine writer and a proactive problem solver. She is poised, mature, and an excellent communicator. She is exceptional at digging into the nuances of a single legal concept or argument, but she is also able to juggle many different balls and keep the big picture in sharp focus. She is very easy to be around and works well and productively with others. Tally will make a fine judicial clerk when she graduates, and I urge you to consider her carefully.

I met Tally in Fall 2021 in my first-year criminal law course. I taught the course in a hybrid format: some students joined via zoom and others joined in person on at least some days (with everyone masked). Hybrid teaching is challenging for many reasons, but one of the great losses for me during that time in my teaching career was the limited interaction I was able to have with students. It was just much harder to get to know them. Some students, however, went out of their way not only to participate in class discussions but also to make the most of online opportunities to connect and learn. Tally was in this very special camp. Tally brought clear thinking to the course as a regular volunteer. She was always prepared, often contributing creative and insightful answers to questions that either I or other students put to the rest of the class. She came to zoom office hours regularly, often spending as much time helping me unwrap a mystery for another student as she did asking her own questions. Tally also took every opportunity to receive feedback on her writing and different approaches to problems in criminal law. Tally wrote an excellent exam, receiving a high A- in the course. Her arguments were clear-eyed and organized, and she showed great judgment in what she chose to emphasize. I came away from the course viewing Tally not only as hardworking and very bright but also as mature, proactive, and excellent at communicating.

In the Fall of 2022, I was delighted to recruit Tally to be my RA on a number of ongoing research projects. I was in need of someone who was not just excellent but who was well rounded in terms of skills and enthusiastic about working on a wide-range of legal topics, from noncompete agreements to access to justice to prosecutorial decision making. Tally loves to write and edit, and she is equally excited about legal research. She worked magic with the first draft of mine she edited, taking it from a rough draft to something far clearer and more polished. She can edit with a light or heavy touch, but in all my experiences with her, she has managed to amplify and improve my writing without interfering with my voice. She is also superb at interrogating citations and sources. In many instances, her careful eye identified gaps in my logic or evidence. Her powers go beyond being a valuable critic, though. Whenever she identified a problem in my writing or research, she always presented one or more potential solutions, some simple and elegant, others more involved but nearly impossible to refute. Her reviews of my work were always comprehensive and thoughtful. I came to trust her work implicitly. When I needed her to start from scratch on developing support for a proposition, she was resourceful and thorough. I found repeatedly that I could rely on Tally, which bodes very well for her potential as a high-quality clerk.

Aside from her work for me, Tally has devoted herself to becoming a better writer and editor while at Michigan. This last year, she took two upper division writing-related courses. Her effort is paying off. A few months ago, her fellow editors on the *Michigan Law Review* elected her to be an Executive Editor of the journal. In that role, she manages her own portfolio of editorial work. Tally was also selected as one of twelve students from an applicant pool of seventy for the Federal Appellate Litigation Clinic, which focuses on identifying and recruiting only the best legal writers and researchers as they head into their 3L year. The Legal Practice Program also selected Tally as a “senior judge” (teaching assistant) to help guide 1Ls as they learn to become legal writers and researchers. It is worth adding that Tally’s grades, while always very good, have only improved over time. She received virtually straight-As in her 2L year.

Tally is more than just a strong writer, editor, researcher, and student. She is also a responsible leader, trusted by her peers to get the job done. Tally’s peers actively encouraged her to throw her hat into the ring before they selected her with enthusiasm as an Executive Editor of the *Michigan Law Review*. In that role, she is more than just an exacting and detail-oriented editor—she serves as a mentor for both junior and senior editors. Her prominence at the *Michigan Law Review* makes plain that Tally thrives not only on her own but also in a collaborative group-type setting. In case any doubt remains, however, she has also worked closely and well with another RA of mine on a number of my projects. The two collaborate as a way to refine and improve their own approaches and final products. I often review their communications with each other on how to solve certain problems or to make a judgment call (usually in comments in word documents), and the professionalism, thoughtfulness, and respect that marks their exchanges is remarkable. I have no doubt that Tally’s easygoing and collaborative style, when combined with her proactive

energy and her willingness to take responsibility, ensures she will be an excellent clerk.

Tally has spent more time than most rising 3Ls enmeshed in the real world of law practice. In her two years as a paralegal in the New York County District Attorney's Office, she distinguished herself as something special, even when facing a fast-paced, high-stakes environment. A letter of recommendation from an ADA from that office in support of Tally's law school application describes her energy, judgment, diligence, willingness to take on responsibility, and proactive problem-solving skills before concluding: "In short, Ms. Wick has distinguished herself as one of the finest pre-law students that I have seen in my career." The letter dovetails really well with my own experiences with Tally. She will make you and your chambers proud.

I hope this letter is useful to you. If I can provide you with any more information about Tally, or answer any questions you have, do not hesitate to call or email me at any time. Thanks for taking the time to read this letter, and good luck with your clerk-hiring process.

Yours truly,

James J. Prescott

James Prescott - jjpresco@umich.edu - 734-763-2326

Tallulah Wick
950 Greene Street, Apt 321, Ann Arbor, MI 48104
(347) 574.6992 • tallulah@umich.edu

Writing Sample

This writing sample is an Opinion, which I wrote for my Judicial Clerkships course in the fall of 2022. The assignment required drafting an opinion for a judge on the United States Court of Appeals for the Sixth Circuit, which addressed 1) whether the defendants' restriction on political candidate advertising is reasonable, and 2) whether the defendants' restriction on scornful advertisements is viewpoint discriminatory. This sample reflects light editing from my professor.

I. Background

A. Factual Background

Defendant Greater Cleveland Regional Transit Authority ("RTA") is a government entity that operates the public transit system in the Cleveland area. R. at 3. RTA provides commercial advertising space on its vehicles and benches. R. at 6. RTA's advertising policy states that RTA "does not intend to create a public forum." R. at 6. The purpose of its advertising forum is to "provide revenue for the RTA while at the same time maintaining RTA ridership and assuring riders will be afforded a safe and pleasant environment. All ads shall be consistent with this purpose." R. at 6. Under RTA's policy, all advertisements need to be preapproved by Defendant Joseph Calabrese, the General Manager and Chief Executive Officer of RTA, and each advertisement must comply with the forum's purpose. R. at 31. Advertisements that fall into the following categories are prohibited:

- Depict or promote an illegal activity.
- Contain false, misleading, or deceptive material.
- Advocate violence or crime or depict the use of firearms.
- Infringe copyright, service mark, title, or slogan.
- Are scornful of an individual or a group of individuals.
- State or imply that the RTA endorses a product or service.
- Support or oppose the election of any political candidate.
- Contain material which is obscene or sexually explicit, as defined by Ohio law.

R. at 6. Therefore, RTA does allow political advertisements but excludes political candidate advertisements.

During the fourteen-year history of the advertising policy, RTA rejected four advertisements. R. at 32. Two advertisements were rejected for supporting or opposing a political candidate. R. at 32. To the best of Calabrese's recollection, at least one of the other two advertisements was rejected for containing false, misleading, or deceptive material. R. at 32. Additionally, RTA mistakenly allowed an advertisement to run that depicted an illegal activity. R. at 33. No advertisement had previously been denied due to scorn, but RTA did review one advertisement for potential scornfulness. R. at 36. This advertisement was directed toward a professional athlete, but Calabrese approved it because under the "particular circumstances" the advertisement did not violate RTA's policy. R. at 36. To make this determination, Calabrese consulted with members of the Board of Trustees. R. at 36.

Plaintiff Katherine Fisher has a long history of environmental activism. R. at 4. As one form of advocacy, Fisher submitted an advertisement to RTA that read, "People who don't recycle are TRASH. By not doing your part you are stealing the future from your children and grandchildren. *for a greener tomorrow, support the only true pro-environment candidate: Yuna Bang for mayor*." R. at 6. Calabrese rejected Fisher's advertisement because it violated RTA's policy against scornful advertisements as well as RTA's ban on political candidate advertisements. R. at 6.

Fisher requested that her advertisement be reconsidered; however, Calabrese rejected her advertisement again, citing the same policy violations. R. at 6. Calabrese expressed that his decision was "pretty easy" because the advertisement called people "TRASH" and "accused people of stealing the future from their children and grandchildren." R. at 38. Fisher maintained that her advertisement was not supposed to make people feel good but rather frustrate or anger people. R. at 22. She conceded her advertisement "might be scornful" but "if it is scornful, the message is that not recycling . . . just mindlessly throwing everything away, is worthy of scorn." R. at 25. Fisher also acknowledged that Yuna Bang, the individual named in her advertisement, "is a political candidate." R. at 26.

B. Procedural Background

On August 8, 2022, Fisher filed suit against RTA and Calabrese, individually and in his official capacity as General Manager and Chief Executive Officer of RTA, under 42 U.S.C. § 1983, alleging that Defendants violated her First Amendment right to free speech by rejecting her advertisement. R. at 2. The following day, Fisher submitted a motion seeking a preliminary injunction ordering Defendants to accept and display her advertisement. R. at 10.

The district court conducted an evidentiary hearing on August 31, 2022. R. at 12. On October 7, 2022, the court held a preliminary injunction hearing. R. at 43. On October 12, 2022, the district court granted Fisher's motion for a preliminary injunction, based on her likelihood of success on the merits. R. at 43. Defendants were ordered to display Fisher's advertisement. R. at 45.

II. Standard of Review

When determining whether to issue a preliminary injunction, district courts must balance the following four factors: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3)

whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of an injunction. *Am. Freedom Def. Initiatives v. Suburban Mobility Auth. for Reg'l Transp*., 698 F.3d 885, 889 (6th Cir. 2012).

Typically, "the scope of review on appeal from the denial or granting of a preliminary injunction is limited to a determination of whether the District Court abused its discretion." *Mason Cnty. Med. Ass'n v. Knebel*, 563 F.2d 256, 260-61 (6th Cir. 1977). However, "[w]hen a party seeks a preliminary injunction on the basis of a potential constitutional violation, the likelihood of success on the merits often will be the determinative factor." *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) (internal quotation marks omitted). In such a case, the "determination of whether the movant is likely to succeed on the merits is a question of law and is accordingly reviewed de novo." *Certified Restoration Dry Cleaning Network v. Tenke Corp.*, 511 F.3d 535, 541 (6th Cir. 2007). For this reason, our review of the district court's decision here – which rests on its conclusion that Fisher is likely to succeed on the merits of her First Amendment claim – is de novo.

III. Discussion

The First Amendment, as incorporated against the states by the Fourteenth Amendment, prohibits the government from "abridging the freedom of speech." U.S. Const. amend. I. The government, however, is not required to open its property to all types of expressive activity at all times. *Miller v. City of Cincinnati*, 622 F.3d 524, 533 (6th Cir. 2010). "[T]he State, no less than a private owner of property, has power to preserve the property under its control for the use which it is lawfully dedicated." *Id.*

The Supreme Court adopted a forum analysis to determine "whether a state-restriction on a speaker's access to public property is constitutionally permissible." *United Food & Com. Workers Union Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 349 (6th Cir. 1998). Fora are classified into three categories: traditional public forum, designated public forum, or nonpublic forum. *Id.* "The strength of the First Amendment protection, and the level of justification required for a speech restriction, varies depending on the forum where the speech occurs." *Ison v. Madison Loc. Sch. Bd. Ed. of Educ.*, 3 F.4th 887, 893 (6th Cir. 2021). Government restrictions on speech in traditional and designated public fora are subject to strict scrutiny. *Miller*, 622 F.3d at 534. In contrast, government restrictions in nonpublic fora need only be reasonable and viewpoint neutral. *United Food*, 163 F.3d at 355.

RTA's refusal to display Fisher's advertisement raises two questions under these rules: (1) What type of forum has RTA created with its advertising space? (2) Do RTA's restrictions satisfy the standard of scrutiny that applies to the speech and forum at issue?

A. Success Based on the Merits

1. What type of forum did RTA establish?

The parameters of the assignment were to omit this section. However, the instructions provided that the judge concluded RTA created a nonpublic forum.

2. Is RTA's restriction on political candidate advertisements reasonable?

Even in a nonpublic forum, the government lacks complete freedom: its restrictions on speech must be reasonable and viewpoint neutral. *Am. Freedom Def. Initiatives v. Suburban Mobility Auth. for Reg'l Transp.*, 978 F.3d 481, 493 (6th Cir. 2020). The reasonableness of the government's restriction is not considered in the abstract but rather "in light of the purpose served by the forum." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985). However, the government does not need to demonstrate "a strict incompatibility between the speech it prohibits and the purpose of the forum." *Id.* at 808. Thus, this requirement is "far less than the strict-scrutiny test for public forums." *Id.* Furthermore, there is no requirement that the government's interest be "compelling." *Id.* at 809. The government's reasons for imposing a restriction need only be permissible. *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1886 (2018).

In *Lehman v. Shaker Heights*, the Supreme Court held that the transit authority's restriction on all political advertisements was reasonable in light of the purpose served by the forum. 418 U.S. 298, 304 (1974) (plurality opinion). The Court reasoned that the advertising space was part of the "commercial venture" of the transit authority and had the purpose of "provid[ing] rapid, convenient, pleasant, and inexpensive services to the commuters of Shaker Heights." *Id.* at 301-03. The restriction on political advertisements was not "arbitrary, capricious, or invidious" but rather pursued "reasonable legislative objectives advanced by the city in a proprietary capacity." *Id.* at 303-04. The transit authority sought "to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience." *Id.* at 304. Thus, the government's objectives were permissible. *Id.* at 303-04 (plurality opinion) (internal quotation marks omitted); *Id.* at 307 (Douglas, J., concurring).

However, permissible ends must be accompanied by reasonable means. *Mansky*, 138 S. Ct. at 1891. Reasonable means require that the government's restrictions are "capable of

reasoned application." *Id.* at 1892. Therefore, the government "must be able to articulate some sensible basis for distinguishing what may come in from what must stay out." *Id.* at 1888. This does not mean that all discretion is prohibited, but rather that a clear definition of the restriction is necessary. *Id.* at 1891.

In *American Freedom Defense Initiatives*, we held that SMART's "unmoored use of the term 'political'" weighed heavily in our finding that its restriction on political advertisements was unreasonable. 978 F.3d at 494 (quotation marks omitted). "Political" can have various meanings, and SMART failed to adequately articulate how broadly or narrowly it intended the term. *Id.* On one hand, SMART's restriction on campaign advertisements provided a narrow, plain meaning definition of "political." *Id.* at 495. The Supreme Court in "*Mansky* [even] . . . seemingly approved of bans on political-campaign materials concerning a candidate running for an election." *Id.* at 498 (citation omitted). On the other hand, SMART had an additional restriction on all political advertisements, which indicated that SMART interpreted the ban to cover something *more* than traditional election materials. *Id.* at 497. However, what *more* was covered under this "political" ban remained ambiguous. *Id*. at 498. Therefore, we concluded SMART could not "rely on its Advertising Guidelines' unadorned use of the word 'political' to create workable standards by itself." *Id.* at 494.

Furthermore, objective, workable standards are also necessary to guide the application of the restriction to proposed advertisements. *Am. Freedom Def. Initiatives*, 978 F.3d at 494. While "a restriction need not be 'narrowly tailored' (the least restrictive means) to achieve [the government's] ends," and "perfect clarity and precise guidance have never been required," officials cannot apply the government's policy on the fly on a case-by-case basis, resulting in erratic application and exclusions. *Mansky*, 138 S. Ct. at 1891; *Am. Freedom Def. Initiatives*, 978 F.3d at 497.

For instance, in *American Freedom Defense Initiatives*, we held that SMART's lack of guidance risked "haphazard interpretations," which substantially contributed to the restriction's unreasonableness. 978 F.3d at 495. Besides its Advertising Guidelines, SMART had no additional materials defining "political," and it provided no training manuals to its employees. *Id.* Moreover, SMART established no objective criteria or guideposts to answer how employees should go about deciding if an advertisement is political or whether employees should limit their analysis to the four corners of the advertisement. *Id.* SMART's initial reviewer for proposed

advertisements could not even identify another factor besides "common sense" for determining if an advertisement is political. *Id.* Not surprisingly, this approach resulted in inconsistencies in how the restriction was applied. *Id.* SMART, therefore, failed to demonstrate "reasoned application" of its restriction, and rather showed its employees' subjective enforcement of the ban on a case-by-case basis. *Id.* at 497.

Here, RTA's reasons for the restriction on political candidate advertisements are permissible. Like the defendant in *Lehman*, RTA seeks "to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience." 418 U.S. at 304. RTA's forum is a commercial venture with the purpose of "provid[ing] revenue for the RTA while at the same time maintaining RTA ridership and assuring riders will be afforded a safe and pleasant environment." R. at 6. While RTA's ban is only on political candidate advertisements and not all political advertisements like the restriction in *Lehman*, we view this discrepancy as insignificant in the context of analyzing the government's ends. We are not alone in interpreting *Lehman* in this fashion. The Fourth Circuit held, "there is a legitimate interest in avoiding some class of politically charged advertisements." *White Coat Waste Project v. Great Richmond Transit Co.*, 35 F.4th 179, 198 (4th Cir. 2022).

In terms of RTA's means, RTA, just like SMART, neither established a clear definition of "political" nor provided a training manual to its employees. Fisher argues RTA, therefore, fails to supply objective, workable standards that guide the application of the restriction. However, the difference between RTA's and SMART's restrictions is significant when analyzing the means. While SMART could not rely on its Advertising Guidelines' unadorned use of the word "political" to create workable standards by itself, RTA can. For the plain language of RTA's policy establishes that RTA meant to prohibit traditional election materials, which the Supreme Court in *Mansky* indicated was constitutional. Moreover, RTA's lack of a general political advertisement restriction further supports that RTA did not intend to exclude something *more* than these traditional election materials.

Due to the clarity of the ban, RTA's restriction does not allow for "haphazard interpretations." RTA employees do not have to look farther than the advertisement itself to determine whether it supports or opposes a political candidate. Therefore, the restriction does not require subjective enforcement by employees on a case-by-case basis. This can be seen by RTA's evenhanded exclusions. RTA rejected two advertisements previously for supporting or

opposing a political candidate. RTA's record shows that it has not incorrectly accepted any advertisements that either directly violate this restriction or could be viewed as contradicting this policy. Additionally, there is no record of any passengers complaining about an advertisement with regard to this restriction. Thus, RTA is capable of reasoned application of its restriction on political candidate advertising that is objective and consistent.

3. Is RTA's restriction on scornful advertisements viewpoint neutral?

RTA also rejected Fisher's advertisement under its restriction banning advertisements that are scornful of an individual or a group of individuals. In nonpublic fora, the government can allow content on certain subjects and restrict speech on other topics. *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018). However, "the government may not engage in a more invidious kind of content discrimination known as 'viewpoint discrimination.'" *Ison v. Madison Loc. Sch. Bd. Ed. of Educ.*, 3 F.4th 887, 893 (6th Cir. 2021) (internal quotation marks omitted). Viewpoint discrimination occurs when the government "does not neutrally treat an entire subject as off limits, but rather permits some private speech on the subject and only disfavors certain points of view." *Id.* The Supreme Court assesses viewpoint discrimination with greater skepticism than content discrimination because viewpoint discrimination "suggests that the government's speech restriction is not designed to preserve a government-owned property for the use to which it is lawfully dedicated." *Am. Freedom Def. Initiatives v. Suburban Mobility Auth. for Reg'l Transp.*, 978 F.3d 481, 498 (6th Cir. 2020) (internal quotation marks omitted).

The Supreme Court defines viewpoint discrimination in a "broad" manner. *Matal v. Tam*, 137 S. Ct. 1774, 1763 (2017) (Alito, J., opinion). This means that "viewpoint discrimination exists even when the government does not target a narrow view on a narrow subject and instead enacts a more general restriction." *Am. Freedom Def. Initiatives*, 978 F.3d at 499. Two Supreme Court cases provide guidance on this broad understanding of viewpoint discrimination. In *Matal*, the Supreme Court struck down the Lanham Act's prohibition on federal trademark registration for any trademarks that would "'disparage . . . or bring . . . into contemp[t] or disrepute' any 'person, living or dead.'" 137 S. Ct. at 1751. The Court held that the anti-disparagement clause was viewpoint discriminatory because the statute allowed a party to "register a positive" trademark about a group "but not a derogatory one," meaning it "singled out a subset of messages" on that subject "for disfavor based on the views expressed." *Id.* at 1766. Therefore,

the anti-disparagement clause discriminated based on viewpoint because "[g]iving offense is a viewpoint." *Id.* at 1763.

Similarly, in *Iancu v. Brunetti*, the Supreme Court struck down the Lanham Act's prohibition on "immoral or scandalous" trademarks because it "disfavored certain ideas." 139 S. Ct. 2294, 2297 (2019). The Supreme Court reasoned the restriction "permit[ted] registration of marks that champion society's sense of rectitude and morality, but not marks that denigrate those concepts." *Id.* at 2299. The policy, therefore, impermissibly "distinguishe[d] between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those provoking offense and condemnation." *Id.* at 2300.

Applying *Matal* and *Iancu*, this Circuit struck down public transit policies that drew similar morality-based distinctions. In *American Freedom Defense Initiatives*, we held that SMART's restriction on advertisements that are likely to scorn or ridicule any person or group "necessarily discriminated between viewpoints." 978 F.3d at 500. For "the restriction facially distinguishe[d] between two opposed sets of ideas: those that promote the group and those that disparage it." *Id.* For instance, SMART's policy allowed for advertisements promoting attendance at a local church; however, advertisements scorning individuals who attended that local church would be rejected for violating the ban on scornful advertisements. *Id.* We held, therefore, that the restriction was viewpoint discriminatory. *Id.* at 498.

Here, RTA, just like SMART in *American Freedom Defense Initiatives*, has a prohibition on scornful advertisements, which fails to be viewpoint neutral. Under RTA's restriction, an advertisement promoting individuals who recycle is allowed, but an advertisement disparaging individuals who recycle is prohibited. Hence, similar to *Iancu*, RTA's policy allows a positive advertisement about a group but not a derogatory one. SMART's policy, like the policies in *Matal* and *American Freedom Defense Initiatives*, provides approval for topics aligned with conventional moral standards while barring content that maligns these same topics. Therefore, in light of *Matal*, *Iancu,* and *American Freedom Defense Initiatives*, RTA's ban on scornful advertisements is viewpoint discriminatory.

B. Remedy

As a result of determining that RTA's restriction on political candidate advertisements is reasonable and its ban on scornful advertisements is viewpoint discriminatory, one provision of